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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
AT SAN FRANCISCO

CENTER FOR ENVIRONMENTAL HEALTH, CAPE FEAR RIVER WATCH, CLEAN CAPE FEAR, DEMOCRACY GREEN, THE NC BLACK ALLIANCE, and TOXIC FREE NC Plaintiffs, vs. JANE NISHIDA, as Acting Administrator of the United States Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY . Defendants.	Civ. No. 21-cv-1535 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, Center for Environmental Health, Cape Fear River Watch, Clean Cape Fear, Democracy Green, The NC Black Alliance, and Toxic Free NC ("Plaintiffs"), as and for their Complaint, allege as follows against Defendants Jane Nishida, as Acting Administrator of the Environmental Protection Agency ("EPA"), and the EPA:

INTRODUCTORY STATEMENT

1. Plaintiffs are nonprofit public health and environmental justice organizations, based in Oakland, California and Eastern North Carolina, concerned about the extensive environmental contamination caused by Per- and Polyfluoroalkyl Substances ("PFAS") and the absence of scientific data on the impacts of this contamination on the health of at risk communities. On October 14, 2020, plaintiffs petitioned defendant Environmental Protection Agency ("EPA") under Section 21 of the Toxic Substances Control Act ("TSCA") to require health and environmental effects testing on 54 PFAS manufactured by The Chemours Company ("Chemours") at its chemical production facility in Fayetteville, North Carolina, downstream of the communities that plaintiffs represent. The petition sought issuance of a rule or order under section 4 of TSCA compelling Chemours to fund and carry out this testing under the direction of a panel of independent scientists. Although the petition demonstrated that the 54 PFAS meet the criteria for testing in section 4(a) of TSCA, defendant EPA denied the petition on January 7, 2021.

2. PFAS have raised significant concern in the US and globally because of their persistence and potential to bio-accumulate, widespread presence in living organisms, products, and the environment, and demonstrated adverse health effects at low doses. In the last few years, several PFAS have been identified in drinking water sources serving nearly 300,000 people in the Cape Fear watershed, in human blood and in environmental media, including air emissions, surface water, sediment, stormwater, groundwater and locally grown produce. This contamination has been linked to the Chemours facility in Fayetteville, which discharges into the Cape Fear River.

3. This action seeks judicial review of the petition denial as authorized in section 21(b)(4)(A of TSCA and the Administrative Procedure Act ("APA"). Plaintiffs ask the Court to compel defendants to initiate a proceeding under section 4(a) of TSCA to issue a rule or order requiring Chemours to fund the studies identified in the petition. The Court should grant this relief because, as plaintiffs demonstrated in their petition and will demonstrate to the Court by a preponderance of evidence, the 54 PFAS meet the standard

for judicial intervention in section 21(b)((4)(B)(i) of TSCA because (1) available information is "insufficient to permit a reasoned evaluation of the[ir] health and environmental effects" and (2) the 54 PFAS "may present an unreasonable risk to health or the environment."

JURISDICTION AND VENUE

4. This action is brought under section 21(b)(4)(A) of TSCA, 15 U.S.C. § 2620, which provides that, upon the denial of a petition under section 21(a), the petitioner "may commence a civil action in a district court of the United States to compel the Administrator to initiate a rulemaking proceeding as requested in the petition." Such an action must be filed within 60 days of the denial of the petition.

5. This action is also filed under section 706 of the APA, 5 U.S.C. § 706, under which a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. §2620(b)(4).

7. The Court has the authority to grant the requested declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202 and 15 U.S.C. §2620(b)(4).

8. Venue is proper in the Northern District of California pursuant to 28 U. S.C. § 1391(e)(1)(C) and 15 U.S.C. §2620(b)(4) because plaintiff Center for Environmental Health resides in the District.

PARTIES

9. Plaintiff Center for Environmental Health ("CEH") is a non-profit organization working to protect children and families from harmful chemicals in air, food, water and in everyday products. Its vision and mission are a world where everyone lives, works, learns and plays in a healthy environment. CEH protects people from toxic chemicals by working with communities, businesses, and the government to demand and support business practices that are safe for human health and the environment. CEH is headquartered in Oakland, California, but members of its staff work in North Carolina and partner closely with locally-

based organizations to address concerns relating to PFAS and other chemicals that threaten the health of North Carolinians.

10. Plaintiff Cape Fear River Watch ("CFRW") is a grassroots environmental nonprofit based in Wilmington, North Carolina whose mission is to protect and improve the water quality of the Cape Fear River Basin for all people through education, advocacy and action. Since its founding, over 25 years ago, it has worked on a wide variety of water quality issues – educating and organizing the community to take action, partnering with researchers, influencing decision makers, and holding polluters accountable. Since learning of the nearly four decades of PFAS contamination of the Cape Fear River, the drinking water supply for nearly 300,000 people, and a vital ecological and economical resource to the region, Cape Fear River Watch, in partnership with academia and the Southern Environmental Law Center, has worked to stop the source of pollution, understand and explain the impacts to human health and the ecosystem, and ensure that those responsible are held accountable.

11. Plaintiff Clean Cape Fear ("CCF") is an all-volunteer, grassroots community group based in the Wilmington, NC area. Its members include educators, environmentalists, doctors, faith leaders, scientists, veterans, and concerned residents all working together to hold Chemours/DuPont accountable for decades of pollution. CFF was formed shortly after learning that toxic chemicals linked to cancer and other serious health problems were detected in finished tap water as a result of Chemours' discharges to the Case Fear River. These discharges and other environmental releases from the facility impact five counties with nearly300,000 residents drinking contaminated tap water downstream from the facility and over 3,500+ well owners with contaminated groundwater near the Fayetteville, NC area.

12. Plaintiff Democracy Green ("DG") is an organization created and run by native North Carolinians-of-color to address the systemic impacts burdening our most climate impacted and disenfranchised communities across North Carolina. DG works in partnership with communities, groups and organizations across the historic U.S. South, in addition to areas hailing the descendants of U.S. chattel slavery and Indigenous sovereign nations. Communities represented by DG have seen the horrific damage caused by

PFAS to North Carolinians and DG cannot stand idly by while the corporations responsible are not held accountable. Democracy Green stands against corporate polluters and the harmful impact of their pollutants and chemicals on frontline communities and low-wealth populations.

13. Plaintiff The NC Black Alliance ("NCBA") is working toward state-level systemic change by strengthening the network of elected officials representing communities of color throughout the state and collaborating with progressive, grassroots networks on intersecting issues. NCBA believes that the communities impacted by climate disasters also face the direct impact of health disparities created by exposure to dangerous chemicals, such PFAS. It is NCBA's conviction that all people have the right to clean air, clean water, access to health care, and a thriving economy.

14. Plaintiff Toxic Free NC ("TFNC") advances environmental health and justice in North Carolina by advocating for safe alternatives to harmful pesticides and chemicals. Founded in 1986, the organization has played a leading role in state-wide pesticide reform and has contributed to national efforts strengthening regulatory protections to protect vulnerable communities and the environment from petrochemical pollution. TFNC believes that PFAS contamination is at the nexus of clean water concerns in North Carolina and that, while high levels of PFAS have been detected in drinking water across the state, the full health impact on the exposed residents of North Carolina is still unknown. Together with other organizations in North Carolina, TFNC advocates for regulatory solutions to prevent further PFAS discharges into our environment and cleanup the PFAS already present. TFNC represents thousands of North Carolina residents whose drinking water has been contaminated and are deeply concerned about the consequences for their health.

15. Defendant Jane Nishida, named in her official capacity as Acting Administrator of EPA, has authority for the implementation of TSCA and is responsible for assuring that the Agency exercises its responsibilities under TSCA in compliance with the law.

16. Defendant EPA is an agency of the United States Executive Branch and, under the direction of Acting Administrator Nishida, is charged with implementing the provisions of TSCA, including by responding to citizens' petitions under section 21.

STATUTORY BACKGROUND

17. TSCA was enacted in 1976 to create a national program for assessing and managing the risks of chemicals to human health and the environment. The need for this comprehensive framework for managing chemical risks was described as follows in the Senate Report on the original law:

> As the industry has grown, we have become literally surrounded by a man-made chemical environment. We utilize chemicals in a majority of our daily activities. We continually wear, wash with, inhale, and ingest a multitude of chemical substances. Many of these chemicals are essential to protect, prolong, and enhance our lives. Yet, too frequently, we have discovered that certain of these chemicals present lethal health and environmental dangers.

Senate Rept. No. 94-698, 94th Cong. 2d Sess. (1976) at 3.

18. Among the goals stated in TSCA section 2(b), 15 U.S.C. §2601(b), is that "adequate information should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of this information should be the responsibility of those who manufacture and those who process such chemical substances and mixtures."

19. This policy is embodied in section 4 of TSCA, which provides EPA with broad authority to require industry to test its chemicals to determine their risks to human health and the environment. Recognizing the need for more testing to support chemical risk determinations, the 2016 TSCA amendments streamline section 4 by authorizing EPA to issue orders in addition to rules requiring development of data.

20. Section 4(a)(1)(A)(i) authorizes EPA to require testing where it determines that –

> the manufacture, distribution in commerce, processing, use, or disposal of a chemical substance or mixture, or that any combination of such activities, *may present an unreasonable risk of injury to health or the environment* (emphasis added).

21. In *Chemical Manufacturers Association v. U.S. Environmental Protection Agency,* 859 F.2d 977 (1988), the D.C. Circuit concluded that "[b]oth the wording and structure of TSCA reveal that Congress

did not expect that EPA would have to document to a certainty the existence of an 'unreasonable risk' before it could require testing." It added that TSCA's legislative history demonstrates that "the word 'may' in section 4 was intended to focus the Agency's attention on chemical substances 'about which there is a basis for concern, but about which there is inadequate information to reasonably predict or determine the effects of the substance or mixture on health or the environment.'"

22. The D.C. Circuit acknowledged that "Congress did not intend to authorize EPA to issue test rules on the basis of mere hunches" but stressed that EPA need not demonstrate that exposure or toxicity is "probable." Instead, EPA may "rely on inferences in issuing a section 4 test rule, so long as all the evidence . . . indicates a more-than-theoretical probability of exposure." Inferences can also support findings of potential toxicity; this can include toxicity data on chemical analogs since "Congress explicitly contemplated that EPA would base test rules on comparisons among structurally similar chemicals."

23. In addition to a "may present" finding, section 4(a)(1)(A)(i) directs EPA to make two further determinations before requiring testing: (1) there is "insufficient information and experience" with which the chemical's effects on health and the environment "can reasonably be determined or predicted"; and (2) testing is "necessary to develop such information." The first determination will be justified whenever data either do not exist or are inadequate to support scientifically supportable conclusions about the chemical's adverse effects. The second determination will be warranted where EPA concludes that the testing to be required is the only way to obtain sufficient information about these effects and that such information cannot be derived from other sources.

24. Once EPA makes these findings, it must require that testing be conducted "to develop information with respect to the health and environmental effects for which there is an insufficiency of information and experience" and which are "relevant to a determination" whether the substance "does or does not present an unreasonable risk to health and the environment."

25. Under section 4(b)(2)(A), a broad range of studies may be required under test rules or orders. These may include studies to determine "carcinogenesis, mutagenesis, teratogenesis, behavioral disorders,

cumulative or synergistic effects, and any other effect which may present an unreasonable risk of injury to health or the environment." Studies to be conducted may include "epidemiologic studies, serial or tiered testing, in vitro tests, and whole animal tests." The rule or order can also require development of information "for the assessment of exposure or exposure potential to humans or the environment."

26. Under section 4(b)(3), testing rules or orders must place responsibility for developing the required data on the entities who manufacture and/or process the chemical to be tested. Section 4(b)(1) provides that the rule or order must prescribe the "protocols and methodologies" for conducting testing and procedures and deadlines for submitting interim and final test results.

27. These requirements are enforceable under TSCA and non-compliance may give rise to civil and criminal penalties under section 16 and specific enforcement under section 17.

28. Testing under TSCA section 4 can be required on chemicals produced for intentional use or as byproducts during a commercial chemical manufacturing operation. EPA defines "byproduct" under TSCA as "any chemical substance or mixture produced without a separate commercial intent during the manufacture, processing, use, or disposal of another chemical substance or mixture." 40 C.F.R. § 712.3(a).

29. Since TSCA's inception, section 21 of the law has contained a petition process by which citizens can seek to compel action by EPA under different provisions of the law. 15 U.S.C. § 2620. The D.C. Circuit has recognized "TSCA's unusually powerful citizen-petition procedures." *Trumpeter Swan Society v EPA*, 774 F.3d 1037, 1939 (D.C, Cir. 2014). EPA is required to respond to the petition within 90 days. If EPA denies the petition or fails to act within 90 days, Section 21 empowers the petitioner to file a civil action in federal district court to "compel the [EPA] Administrator to initiate a rulemaking proceeding as requested in the petition." 15 U.S.C. §2620(b)(4)(A).

30. As amended in 2016, section 21(a) authorizes citizens to petition for, *inter alia*, issuance of a rule or order under Section 4 requiring manufacturers and processors to conduct testing on chemical substances and mixtures. *Id.* § 2620(a). Under Section 21(b)(4)(B), where the petition sought issuance of a rule or

order under section 4, "the petitioner shall be provided an opportunity to have such petition considered by the court in a *de novo* proceeding." 15 U.S.C. § 2620(b)(4)(B).

31. For petitions seeking issuance of rules or orders under section 4, Section 21(b)(4)(B)(i) directs the district court to "order the Administrator to initiate the action requested by the petitioner" if it "demonstrates to the satisfaction of the court by a preponderance of the evidence" that "(I) information available to the Administrator is insufficient to permit a reasoned evaluation of the health and environmental effects of the chemical substance to be subject to such rule or order; and (II) in the absence of such information, the substance may present an unreasonable risk to health or the environment . . . " 15. U.S.C. §2620(b)(4)(B)(i))I)-(II).

32. Section 26(c)(1) of TSCA authorizes EPA to treat a group of chemical substances as a "category" under section 4 and other TSCA provisions. 15 U.S.C § 2625(c)(1). If the Agency designates chemicals as a "category," testing or other requirements prescribed by EPA would apply to each substance in the category. Under section 26(c)(2), "category" treatment is warranted if chemicals are "similar in molecular structure, in physical, chemical or biological properties, or in mode of entrance into the human body or into the environment" or "in some other way are suitable for classification as such for purposes of this Act."

RISKS OF PFAS TO HUMAN HEALTH AND THE ENVIRONMENT

33. Plaintiffs' October 14, 2020 petition provides considerable background information on PFAS. Highlights are summarized in the paragraphs below.

34. PFAS have a unique set of properties with an unusual ability to cause serious and widespread harm to public health and the environment. A defining feature of PFAS is their carbon-fluorine bonds, which impart high thermal stability and resistance to degradation. Because of their pronounced ability to repel oil and water, PFAS have been used in a variety of industries in the US and around the globe.

35. The EPA Action Plan for PFAS identifies numerous human exposure pathways for these chemicals,

including:[1]

- Drinking water from public water and private water systems, typically localized and associated with a release from a specific facility (e.g., manufacturer, processor, landfill, wastewater treatment, or facilities using PFAS-containing firefighting foams);
- Consumption of plants and meat from animals, including fish that have accumulated PFAS;
- Consumption of food that came into contact with PFAS-containing products (e.g., some microwaveable popcorn bags and grease-resistant papers);
- Use of, living with, or otherwise being exposed to commercial household products and indoor dust containing PFAS, including stain- and water-repellent textiles (including carpet, clothing and footwear), nonstick products (e.g., cookware), polishes, waxes, paints, and cleaning products;
- Employment in a workplace that produces or uses PFAS, including chemical production facilities or utilizing industries (e.g., chromium electroplating, electronics manufacturing, or oil recovery); and
- In utero fetal exposure and early childhood exposure via breastmilk from mothers exposed to PFAS.

36. PFAS are often called "forever" chemicals because they do not break down or degrade over time and therefore are highly persistent. Thus, they build up in the natural environment and in biological systems if they are bioaccumulative. These characteristics, combined with the high mobility of many PFAS, have resulted in their widespread distribution and pervasive presence both in environmental media and in people and wildlife around the globe, including many remote locations. Thus, PFAS have been detected in the blood of workers and the general population, with 99 percent of those sampled showing detectable levels of these compounds.

37. This PFAS body burden is a function of multiple exposure pathways, including air emissions, food and water consumption, consumer products like carpet or clothing and house dust. Because of their resistance to degradation, there is no known safe method of disposal of PFAS that would prevent build-up in the environment at the end of their useful lives.

38. In addition to their persistence, PFAS have high mobility, especially in water. Their high water solubility and environmental persistence together make PFAS a ubiquitous pollutant of surface and

[1] EPA's Per- and Polyfluoroalkyl Substances (PFAS) Action Plan, February 2019.

groundwater. As a result, PFAS-contaminated drinking water is a widespread threat across the US; a growing number of drinking water suppliers have detected PFAS in source water or tap water, raising concerns about drinking water safety and resulting in use of costly treatment systems in numerous communities across the country.

39. Animal studies demonstrate that PFAS are linked to many serious health effects, including cancer, hormone disruption, liver and kidney damage, developmental and reproductive harm, changes in serum lipid levels, and immunotoxicity, often at low doses. Human studies of populations with elevated blood levels of PFAS have shown associations with a variety of health conditions, including kidney and testicular cancer, elevated cholesterol, liver disease, decreased fertility, thyroid problems and changes in hormone levels and immune systems. Moreover, concurrent exposure to multiple PFAS may have additive or synergistic effects.

40. To date, EPA has failed to use its testing authorities under TSCA section 4 to fill the extensive data-gaps on PFAS.

CONTAMINATION OF THE CAPE FEAR RIVER BASIN BY THE CHEMOURS FACILITY

41. Plaintiffs' petition also described in detail the operation of the Chemours' facility in Fayetteville, North Carolina and the PFAS contamination it has created in the Cape Fear River basin. Key highlights are summarized in the following paragraphs.

42. The Chemours plant is located on a 2,150-acre site in a rural area south of Fayetteville, adjacent to the west bank of the Cape Fear River. The river continues for over 110 km to the City of Wilmington and then broadens into an estuary that ultimately flows into the Atlantic Ocean. Residents of Wilmington and other population centers downstream from the facility use the river as a source of drinking water. .

43. The facility was built and operated by DuPont and started producing fluoropolymers in 1971. In 2015, DuPont spun off its performance chemicals business to Chemours, a newly created company which then acquired the Fayetteville plant and other former DuPont facilities.

44. The plant is a major producer and user of PFAS. Its PFAS-based product lines are

Fluoromonomers, Fluorinated Vinyl Ethers and Nafion® Polymers, which are used as membranes in fuel cells and chlorine production. The mix of precursors, byproducts, degradation products and commercial substances associated with these product lines is complex and not well-understood but likely involves hundreds if not thousands of individual PFAS, many of which have chemical structures that are as yet unidentified.

45. A major source of concern has been Chemours' production of "GenX" compounds. These chemicals have been produced as byproducts at the Fayetteville since the early 1980s. They were recently commercialized as a replacement for perfluorooctanoic acid (PFOA), a surfactant in the polymerization of fluoropolymers that was phased out in 2015 in response to health and environmental concerns.

46. During monitoring by Strynar et al. and Sun et al., GenX and nine other PFAS were identified in the Cape Fear River and drinking water downstream of the Fayetteville plant.[2] In further sampling of the river downstream of the plant, McCord et al. (2019) found 37 unique PFAS molecules.[3] Several of these compounds were also detected in the blood of residents of the Cape Fear region, confirming human exposure.[4] Sampling in the Cape fear River indicated that total PFAS concentrations (all substances combined) were 130,000 parts per trillion (ppt).[5] Sampling by water utilities subsequently identified numerous PFAS linked to Chemours' operations in drinking water intakes.

47. As concern increased about surface water and drinking water contamination, monitoring of other environmental media for the presence of PFAS produced at the Fayetteville plant was initiated. As

[2] Hopkins, Z. R., Sun, M., DeWitt, J. C. & Knappe, D. R. U. Recently Detected Drinking Water Contaminants: GenX and Other Per- and Polyfluoroalkyl Ether Acids. *Journal AWWA* **110**, 13-28, doi:10.1002/awwa.1073 (2018).

[3] McCord, J. & Strynar, M. Identification of Per- and Polyfluoroalkyl Substances in the Cape Fear River by High Resolution Mass Spectrometry and Nontargeted Screening. *Environmental Science & Technology* **53**, 4717-4727, doi:10.1021/acs.est.8b06017 (2019).

[4] Kotlarz, N. *et al.* Measurement of Novel, Drinking Water-Associated PFAS in Blood from Adults and Children in Wilmington, North Carolina. *Environmental Health Perspectives* **128**, 077005, doi:doi:10.1289/EHP6837 (2020).

[5] Zhang, C., Hopkins, Z. R., McCord, J., Strynar, M. J. & Knappe, D. R. U. Fate of Per- and Polyfluoroalkyl Ether Acids in the Total Oxidizable Precursor Assay and Implications for the Analysis of Impacted Water. *Environ Sci Technol Lett* **6**, 662-668, i:10.1021/acs.estlett.9b00525 (2019).

determined in Chemours' compliance testing under a North Carolina consent order, several additional PFAS associated with the Fayetteville Works facility have been detected in private wells, wastewater, stormwater, sediment, groundwater, soil, air emissions, and local produce, including a large number of compounds of uncertain chemical composition.

48. The 2019 consent order between Chemours and the North Carolina Department of Environmental Quality (DEQ) requires controls on wastewater discharges and air emissions of PFAS, directs Chemours to identify constituents of wastewater and process streams and to conduct environmental monitoring, provides for groundwater remediation, and requires health and environmental effects testing of five PFAS. Sampling of drinking water systems and private wells since the order was issued documents the continuing presence of GenX and several other PFAS.

PLAINTIFFS' PETITION FOR A TEST RULE OR ORDER UNDER TSCA SECTION 21

49. Plaintiffs' petition identified 54 PFAS linked to the Chemours facility that warrant health and environmental effects testing. Petitioners selected these 54 PFAS based on evidence of known or anticipated human exposure as demonstrated by available data on their presence in human sera, drinking water, surface water, air emissions, rainwater, private wells, groundwater and produce. The petition maintained that the 54 PFAS meet TSCA criteria for testing because (1) data on their effects are insufficient or unavailable and (2) they may present unreasonable risks by virtue of the combination of potential toxicity and exposure.

50. The 54 PFAS were divided into Tier 1 substances (for which there is known human exposure based on detection in blood, food or drinking water) and Tier 2 substances (for which human exposure is probable based on detection in environmental media). The detailed justification for assigning substances to these Tiers is provided in Attachment 2 to the petition, the Chemours PFAS Master Testing List.

51. The petition maintained that, since EPA and other authorities have recognized that all PFAS have the potential for causing the adverse health and environmental effects linked to well-characterized substances in the class, there is a strong basis to conclude that the 54 PFAS "may present an unreasonable

risk of injury" under TSCA section 4(a)(1)(A). According to the petition. this potential risk is magnified by the co-occurrence of multiple PFAS in drinking and surface water, other environmental media and the blood of humans and wildlife in the Cape Fear watershed. Where exposure is to multiple PFAS simultaneously, the petition emphasized, their toxic effects may be additive or synergistic, resulting in greater overall risk than exposure to any individual PFAS alone.

52. The petition also maintained that the "sufficiency" of available information on the 54 PFAS should be determined by comparing available data with the known adverse effects of other PFAS. According to the petition, if a scientifically sound assessment of each of the 54 chemicals for these critical toxic endpoints cannot be conducted because of the lack of data, available information on these substances should be deemed "insufficient" under TSCA section 4(a).

53. The petition then showed that the 54 substances lack any health and ecological effects data or the available studies are limited and incomplete and do not provide an adequate basis for hazard and risk assessment. Key data gaps include measurement of physical-chemical properties, methods of analysis, assessment of partitioning, bioaccumulation, and degradation, pharmacokinetics, and toxicity, especially for the endpoints commonly observed for the better studied PFAS, such as liver toxicity, and effects on the immune system, lipid metabolism, kidney, thyroid, development, reproduction, and cancer. In addition, despite their widespread detection in environmental media, ecotoxicity data are generally lacking.

54. Based on its showings of potential unreasonable risk and insufficiency of data, the petition proposed the following testing program:

Experimental Animal Studies

- Compounds in both Tiers would undergo 28-day repeated dose rodent toxicology studies coupled with reproductive and developmental toxicity screening assays, examining critical PFAS endpoints including hormone disruption, liver and kidney damage, developmental and reproductive harm, changes in serum lipid levels, and immune system toxicity.

- These studies would also be conducted on three mixtures of PFAS representative of the groups of substances to which residents have been exposed through drinking water, human sera and other pathways.

- Multigeneration or extended one-generation and 2-year rodent carcinogenicity studies would be conducted on the 14 Tier 1 substances in recognition of the evidence of direct and substantial human exposure and the concerns for these endpoints demonstrated by other PFAS.

- Most studies would be carried out in two species (mice and rats) and by oral routes of administration, except inhalation would be used for volatile chemicals.

- Toxicokinetic studies would be conducted to characterize relationships between serum concentrations and dermal, oral and inhalation exposures in the test species, and to evaluate biological half-life and potential for bioaccumulation.

- Testing requirements would be based on EPA and OECD guidelines, with appropriate adjustments to reflect sensitive endpoints that have been reported for PFOA, PFOS, and GenX.

Human Studies

- A human health study for the Cape Fear watershed would be conducted using a similar study design to that used for the Parkersburg, WV PFOA (C8) study. The goal of the study would be to determine the relationship between exposure to the mixtures of PFAS that characterize current and historical exposure in the Cape Fear watershed and health outcomes among exposed populations.

- Testing would also be performed to determine human half-lives of the listed chemicals through longitudinal biomonitoring and exposure estimation in workers.

Ecological Effects/Fate and Transport and Physical-Chemical Properties Studies

- Testing would include ecological effects studies, similar to studies conducted on GenX.

- EPA would require development of analytical standards where not currently available, physical-chemical properties tests, and fate and transport studies in order to identify and predict exposures.

55. The petition proposed that, to maximize the credibility and objectivity of the data and key findings, EPA contract with the National Academy of Sciences (NAS) to form an independent expert science panel with responsibility for overseeing all aspects of the testing program. The public and Chemours would have the opportunity to submit nominations for membership on the panel.

EPA'S DENIAL OF PLAINTIFFS' PETITION

56. The January 7, 2021 petition denial affirmed EPA's "high concern" about PFAS and did not dispute that all PFAS are of concern for serious health effects based on the properties of the class. Nor did EPA deny that most of the 54 PFAS have been detected in the environment, resulting in exposure by North Carolina residents and putting them at risk of harm.

57. The bulk of the petition denial (pp. 8-18) consists of a lengthy summary of the EPA PFAS Action Plan and a detailed list of the various PFAS-related measures EPA has taken under the Plan and other programs. This list of EPA accomplishments is irrelevant to the petition. These EPA actions do not speak to whether the 54 PFAS in the petition meet the criteria for testing in section 4 of TSCA and provide no basis for denying the petition.

58. The petition denial also asserts (p. 19) that "the petitioners have not provided the facts necessary for the Agency to determine for each of the 54 PFAS that existing information and experience are insufficient and testing of such substance or mixture with respect to such effects is necessary to develop such information."

59. However, before filing the petition, plaintiffs reviewed the available data for the 54 PFAS. As the petition explains, some testing has been conducted or is underway on a small number of compounds but it fails to provide necessary data for all-endpoints and most of the 54 PFAS have no health effects data at all.

60. In addition, EPA and many other expert bodies agree that there are fundamental data gaps for nearly all PFAS. As underscored in EPA's PFAS Action Plan, "[t]here are many PFAS of potential concern to the public that may be found in the environment. Most of these PFAS lack sufficient toxicity data to inform our understanding of the potential for adverse human or ecological effects."

61. The petition denial (pp. 23-24) also "finds that the petitioners failed to address ongoing testing and data collection for some of the 54 PFAS, thereby failing to set forth facts that are necessary to establish there is a need for the testing sought in the petition. This research may provide information that overlaps with testing the petitioners requested, which would render the information unnecessary under TSCA section 4(a)(1)(A)(i)(III)."

62. However, nearly all the ongoing research cited by EPA consists of *in vitro* assays, including high-throughput testing conducted by the EPA Office of Research and Development (ORD) to determine various markers of bioactivity that might signal the potential for *in vivo* effects. The health effects testing proposed in the petition consists of *in vivo* animal studies, epidemiological research and limited monitoring of

workers. No *in vitro* assays are included. Non-animal test methods (New Approach Methods or NAMs) cannot at this time provide a scientifically sufficient understanding of the health and environmental effects of PFAS.

PETITIONERS' REQUEST FOR RECONSIDERATION

63. On March 4, 2021, plaintiffs submitted to defendant EPA a request to reconsider and grant their October 14, 2020 petition. The request provided a point-by-point rebuttal to the grounds for Agency's January 7, 2021 petition denial.

64. To eliminate any possible doubt about the insufficiency of available data for the 54 PFAS, the reconsideration request provided the results of a systematic and comprehensive literature search conducted by petitioners' scientific consultants on these substances. This search included EPA's ChemView and CompTox data-bases as well as Pub-Med and ECHA files. The search showed that the 54 PFAS lack most or all of the studies proposed in plaintiffs' petition.

FIRST CLAIM FOR RELIEF

65. Plaintiffs hereby incorporate by reference the allegations contained in paragraphs 1 through 64 as if fully set forth herein.

66. TSCA section 21(b)(4)(A) provides a right to judicial review in an appropriate district court within 60 days following denial of a petition to issue a rule or order requiring testing under TSCA section 4.

67. On October 14, 2020, plaintiffs petitioned defendant EPA under Section 21(a) of TSCA to require health and environmental effects testing on 54 PFAS manufactured by Chemours at its chemical production facility in Fayetteville, North Carolina, downstream of the communities that plaintiffs represent. The petition sought issuance of a rule or order under section 4 of TSCA compelling Chemours to fund and carry out this testing under the direction of a panel of independent scientists.

68. EPA denied the petition on January 7, 2021.

69. Following the denial of a petition seeking the issuance of a rule or order under TSCA section 4, section 21 provides that "the petitioner shall be provided an opportunity to have such petition considered by the court in a de novo proceeding." 15 U.S.C. §2620(b)(4)(B).

70. Section 21(b)(4)(B)(i) provides that, where the petition seeks issuance of a rule or order under section 4, the district court shall "order the Administrator to initiate the action requested by the petitioner" if it "demonstrates to the satisfaction of the court by a preponderance of the evidence" that "(I) information available to the Administrator is insufficient to permit a reasoned evaluation of the health and environmental effects of the chemical substance to be subject to such rule or order; and (II) in the absence of such information, the substance may present an unreasonable risk to health or the environment . . . " 15. U.S.C. §2620(b)(4)(B)(i))I)-(II).

71. The preponderance of the evidence to be presented by plaintiffs demonstrates that the 54 PFAS proposed for testing in their petition meet these standards for ordering EPA to issue a test rule or order under section 4 TSCA.

72. The Court should thus direct EPA to initiate a proceeding for the issuance of a rule or order requiring Chemours to carry out the studies on the 54 PFAS specified in plaintiffs' petition.

SECOND CLAIM FOR RELIEF

73. Plaintiffs hereby incorporate by reference the allegations contained in paragraphs 1 through 64 as if fully set forth herein.

74. Under section 706 of the APA, 5 U.S.C. § 706, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

75. Denials of petitions under TSCA section 21 are reviewable under these APA provisions as well as under the *de novo* review provisions in section 21(b)(4)(B).

76. Defendants January 7, 2021 denial of plaintiffs' petition was arbitrary and capricious, an abuse of discretion and not in accordance with law.

77. The petition denial should be declared unlawful under the APA judicial review provisions.

78. Under section 21(b)(4), if denial of a petition is set aside under the APA, the Court may order EPA "to compel the Administrator to initiate a rulemaking proceeding as requested in the petition."

79. The Court should thus direct EPA to initiate a proceeding for the issuance of a rule or order requiring Chemours to carry out the studies on the 54 PFAS specified in plaintiffs' petition.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs respectfully request judgment in their favor and against defendants upon their claims and, further, request that this Honorable Court enter judgment against defendants:

(1) Declaring that plaintiffs have demonstrated by a preponderance of the evidence that, with respect to the 54 PFAS proposed for testing in their petition, "(I) information available to the Administrator is insufficient to permit a reasoned evaluation of the health and environmental effects of the chemical substance to be subject to such rule or order; and (II) in the absence of such information, the [PFAS]may present an unreasonable risk to health or the environment . . ., " pursuant to 15 U.S.C. § 2620(b)(4)(B)(i);

(2) Declaring that defendants' denial of plaintiffs' petition was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under 5 U.S.C. § 706;

(3) Ordering defendants to initiate a proceeding for the issuance of a rule or order under TSCA section 4 requiring Chemours to conduct the studies on the 54 PFAS requested in plaintiffs' petition, pursuant to 15 U.S.C. § 2620(b)(4)(B);

(4) Awarding plaintiffs their costs of suit and reasonable fees for attorneys and expert witnesses in this action pursuant to 15 U.S.C. § 2620(b)(4)(C); and

(5) Granting plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 3rd day of March 2021.

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIANS FOR RENEWABLE ENERGY, et al.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et ano.,

Defendants.

Case No. 4:15-cv-03292-SBA (LB)

PLAINTIFFS' APPLICATION FOR AN AWARD OF ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

Californians for Renewable Energy, Ashurst/Bar Smith Community Organization, Citizens for Alternatives to Radioactive Dumping, Saint Francis Prayer Center, Sierra Club, and Michael Boyd ("Plaintiffs") hereby apply for an award of attorney's fees and expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), in the total amount of $1,118,808.41 for work in this case brought primarily under a provision of the Administrative Procedure Act, 5 U.S.C. § 706. Plaintiffs successfully challenged EPA's failure to timely act in accordance with 40 C.F.R. § 7.115 on Plaintiffs' respective administrative complaints under Title VI of the Civil Rights Act of 1964.

Under EAJA, a court shall award fees and costs to a prevailing party in a civil case against a federal agency, such as this one, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. *See* 28 U.S.C. § 2412(d).

Because Plaintiffs and Defendants seek to efficiently resolve their disputes and avoid undue administrative burdens on the court, the parties are filing concurrently a stipulation to defer further proceedings on this fee application while they attempt to resolve the matter by settlement.

ARGUMENT

I. Plaintiffs Are the Prevailing Party

Plaintiffs are "prevailing parties" in this litigation because the Court (1) denied EPA's motion to dismiss; (2) granted Plaintiffs' motion for summary judgment as to Claims One through Five; and (3) issued a judgment that materially altered the legal relationship between the parties and was substantially similar to Plaintiffs' proposed judgment. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) ("[A] 'prevailing party' is one who has been awarded some relief by the court . . . ."); *Saint John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1058–59 (9th Cir. 2009). Plaintiffs successfully sought and obtained declaratory and injunctive relief regarding EPA's failure to meet its mandatory duty to timely issue preliminary findings and recommendations for voluntary compliance regarding Plaintiffs' Title VI administrative complaints.

That the Court ruled in Plaintiff's favor for five of their six claims – instead of all six – in no way diminishes Plaintiffs' status as prevailing parties. "[A] prevailing party need not achieve all of

the relief claimed, but merely some of the benefit the parties sought in bringing the suit." *Park ex rel. Park v. Anaheim Union High Sch. Dist*., 464 F.3d 1025, 1035 (9th Cir. 2006) (internal quotation marks and citation omitted); *see also Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Here, the Court found that EPA "often takes years to act on a [Title VI] complaint—and even then, acts only after a lawsuit has been filed," and granted Plaintiffs declaratory and prospective injunctive relief in accordance with that finding. *See* Dkt. 114 at 29; *see also* Am. J., Dkt. 145 at 2. Because Plaintiffs achieved almost all of the relief they sought in this suit, they are the prevailing parties. *See Park*, 464 F.3d at 1035.

II. EPA Cannot Meet Its Burden Under EAJA of Showing That its Position Was Substantially Justified

Defendants can defeat an award only if they can prove that their position both prior to and in the litigation was substantially justified. 28 U.S.C. § 2412(d); *Rawlings v. Heckler*, 725 F.2d 1192 (9th Cir. 1984). EPA bears the burden of proving such justification. *Williams v. Bowen*, 966 F.2d 1259, 1261 (9th Cir. 1991); *Int'l Woodworkers of Am., AFL-CIO v. Donovan*, 769 F.2d 1388, 1390 (9th Cir. 1985).

Defendants cannot meet this burden here. The Court's forty-page Opinion and Order on the parties' dispositive motions pointedly described why EPA's positions both prior to and during the litigation were not justified. As the Court noted, "[d]espite the prior litigation involving its failures to resolve Title VI complaints in a timely manner and this Circuit's criticism of those delays, the EPA has allowed Plaintiffs' complaints to languish for decades. It was only during the pendency of this action that the EPA resolved each of Plaintiffs' administrative complaints." Dkt. 114 at 29.

The Court also took issue with the substance of the Defendants' arguments defending their failure to act on the Title VI complaints. Specifically, the Court found it "clear that [EPA regulations] impose[] a mandatory duty upon the EPA to issue preliminary findings within 180 days of accepting a complaint for investigation," despite EPA's "deni[al of] the existence of a mandatory duty." *Id.* at 23–24. Indeed, the Court explained that EPA's position was contrary to Ninth Circuit authority and did not "make any logical sense." *Id.* at 25, 29.

Finally, the Court also called into question Defendants' unrelenting refusal to accept that their conduct was unjustified and the Court's orders regarding that conduct. In fact, the Court lamented that despite "significant motion practice, including voluminous motions for summary judgment and to dismiss" and letter briefing about the proposed form of judgment, EPA, "apparently dissatisfied with the Court's resolution," filed a motion to amend the Judgment. Order Referring Action for Further Settlement Conference, Dkt. 118.

Under these circumstances, Defendants cannot demonstrate that their position was substantially justified.[1]

III. Plaintiffs Are Eligible for an EAJA Award

Individuals whose net worth does not exceed $2,000,000 and organizations with fewer than 500 employees whose net worth does not exceed $7,000,000 or that are exempt from taxation under section 501(c)(3) of the Internal Revenue Code are eligible for fees under the EAJA. *See* 28 U.S.C. § 2412(d)(2)(B). Each of the plaintiff organizations in this case, except Sierra Club, meets the eligibility requirements for an award of fees and costs under EAJA. Michael Boyd is an individual whose net worth does not exceed $2,000,000. Californians for Renewable Energy and the Saint Francis Prayer Center are exempt from taxation under section 501(c)(3) of the Internal Revenue Code. Citizens for Alternatives to Radioactive Dumping and Ashurst Bar/Smith Community Organization and are organizations with a net worth below $7 million and fewer than 500 employees. Accordingly, these Plaintiffs satisfy the EAJA party eligibility requirements for an award of fees and costs.

The participation of Sierra Club in the lawsuit does not alter the availability of a fee award under EAJA to the other Plaintiffs because those Plaintiffs would have pursued the case even without the participation of Sierra Club and Plaintiffs' attorneys likely would not have brought the case without the participation of at least some of the EAJA-eligible Plaintiffs. *See Wash. Dep't of Wildlife v. Stubblefield*, 739 F. Supp. 1428, 1431–32 (W.D. Wash. 1989); *see also Nat. Res. Def. Council, Inc. v. Winter*, No. CV 06-4131 FMC (JCx), 2007 WL 9754340, at *2 (C.D. Cal. Jan. 3,

[1] Indeed, EPA's positions prior to and during the litigation also form the basis for an award of fees at the market rate, rather than EAJA's general statutory rate. *See infra* p. 4-6.

2007); *United States v. 27.09 Acres of Land*, 43 F.3d 769, 774–75 (2d Cir. 1994). The eligible parties may seek a full award of fees under the EAJA. *See Ctr. for Food Safety v. Vilsack*, No. C-08-00484 JSW (EDL), 2011 WL 6259891, at *10 (N.D. Cal. Oct. 13, 2011), report and recommendation adopted by 2011 WL 6259683 (N.D. Cal. Dec. 15, 2011) (awarding eligible plaintiffs full attorney fees under EAJA despite the participation of ineligible Sierra Club as a plaintiff); *League for Coastal Prot. v. Kempthorne*, No. C 05-0991-CW, 2006 WL 3797911, at *3 (N.D. Cal. Dec. 22, 2006) (same).[2]

IV. Plaintiffs Are Entitled to an Enhancement for Their Attorneys' Rates

As established above, Plaintiffs prevailed on their core claims and thus are entitled to the full amount allowed under the EAJA. "The result is what matters … [where] a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435 (noting that "litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee). Because Plaintiffs obtained an excellent result here, their attorneys "should recover a fully compensatory fee." *See id*.

While EAJA establishes a fee recovery rate of $125 per hour, a court may award a higher rate based on "a special factor, such as the limited availability of qualified attorneys for the proceedings involved," 28 U.S.C. § 2412(d)(2)(A), or where an attorney is "'qualified for the proceedings' in some specialized sense," *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). A defendant's "bad faith," such as continuation of an action it knew to be baseless, may also entitle a qualifying plaintiff for fee enhancement. *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1180–81 (9th Cir. 2019) (en banc).

Plaintiffs are entitled to enhanced rates for their attorneys' time because of their attorneys' unique and specialized expertise at the intersection of both civil rights and environmental litigation, as well as the limited availability of such qualified litigators for this type of proceeding. *Pierce*, 487 U.S. at 572; *Nat. Res. Def. Council, Inc. v. Winter*, 543 F.3d 1152, 1162 (9th Cir. 2008). Examples

[2] Plaintiffs will provide supporting declarations and other evidence to more fully address any fee award eligibility issues, if necessary, at the time the application is fully briefed and presented to the Court.

of distinctive knowledge and specialized skill include "an identifiable practice specialty." 543 F.3d at 1158. Federal environmental law and expertise in civil rights are specialized practice areas warranting fee enhancements under EAJA in the Ninth Circuit. *See, e.g., Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991) ("Environmental litigation is an identifiable practice specialty that requires distinctive knowledge."); *Nadarajah v. Holder*, 569 F.3d 906, 912 (9th Cir. 2009) (awarding enhanced rates to attorneys with "distinctive knowledge and specialized skill in . . . litigation involving the rights of detained immigrants"). Indeed, in numerous cases, courts have granted attorneys at Earthjustice (formerly the Sierra Club Legal Defense Fund) fee enhancement for their special expertise in environmental law. *See, e.g.*, *Pollinator Stewardship Council v. EPA*, No. 13-72347, 2017 WL 3096105 (9th Cir. 2017); *Portland Audubon Soc'y v. Lujan*, 865 F. Supp. 1464, 1476 (D. Or. 1994); *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081 (W.D. Wash. 1991), *aff'd*, 952 F.2d 297 (9th Cir. 1991).

This case "involved more than a routine or straightforward application of the Administrative Procedure Act . . . [It required] distinctive knowledge or specialized skill" regarding civil rights and environmental law at the state and federal levels. *Pollinator Stewardship Council*, 2017 WL 3096105, at *4; *see also Nat. Res. Def. Council*, 543 F.3d at 1161. Plaintiffs' attorneys possessed the knowledge and skills needed to prosecute this case, including, but not limited to, experience litigating civil rights cases; extensive familiarity with the EPA Office of Civil Rights' procedures, practices, and prior positions; environmental standing; and the availability – or lack thereof – of adequate alternative remedies under federal and state environmental and civil rights law for Plaintiffs' claims.[3] These skills are in short supply in the market at EAJA rates. For these reasons, Plaintiffs seek reimbursement at enhanced market rates for the legal services provided by its attorneys.[4]

[3] Plaintiffs will provide supporting declarations and other evidence to more fully address the relevant expertise of Plaintiffs' attorneys, if necessary, at the time the application is fully briefed and presented to the Court.

[4] The rates included in the table below are reasonable based on the skill and experience of the attorneys who handled the case, as well as the prevailing market rate of attorneys of equivalent specialization, skill, and experience. *See Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210–11 (9th Cir. 1986); *see also Blum v. Stenson*, 465 U.S. 886, 895 (1984). Plaintiffs will provide supporting declarations and other evidence to more fully address reasonable hourly rates, if necessary, at the time the application is fully briefed and presented to the Court.

Plaintiffs are also entitled to market rates for their fees because of EPA's bad faith in this action. *Ibrahim*, 912 F.3d at 1180–81. An "agency's continuation of an action it knew to be baseless" is a "prime example of bad faith" entitling Plaintiffs to fees at the market rate, rather than EAJA's general statutory rate. *Id.* (quoting *Mendenhall v. Nat'l Transp. Safety Bd.*, 92 F.3d 871, 877 (9th Cir. 1996)). Here, the court noted Defendants' persistent litigation in defense of their noncompliance with their civil rights obligations, despite clear directives to change course. Specifically, the Court stated it "is well documented that the EPA has been sued repeatedly for failing to investigate Title VI complaints in a timely manner" and that "EPA often takes years to act on a complaint—and even then, acts only after a lawsuit has been filed." Dkt. 114 at 29. Judge Armstrong concluded by observing that "despite Ninth Circuit authority to the contrary, the EPA continues to argue in this action that it has no mandatory duty to act on Title VI complaints." *Id*.

V. The Hours for Which Reimbursement Is Sought Are Appropriate

Plaintiffs seek a fee recovery for the time spent by their attorneys and legal staff under attorney supervision. Plaintiffs derived the hours for which reimbursement is sought from the time records of the attorneys, after eliminating time for arguably non-compensable tasks and exercising billing judgment to further reduce the number of hours for which fees are sought. A summary of the time for each attorney and supervisee is set out below. The time records for these hours will be submitted when this application is fully briefed and presented. The hours for which reimbursement is sought are reasonable in light of the nature and extent of the proceedings in this case. *See supra* Footnote 4.

CARE v. EPA, Case No. 4:15-cv-03292-SBA (LB)					
Name	**Role and Experience**	**Years Worked**	**Total Hours[5]**	**Rate**	**Amount Incurred**
Deborah Goldberg	Att'y, 1986 J.D.	2016-2018	13.4	$700	$9,380.00
Marianne Engelman Lado	Att'y, 1987 J.D.	2015-2020	322.5	$750	$241,875.00
Suzanne Novak	Att'y, 1997 J.D.	2016-2020	589.5	$650	$383,175.00
Irene Gutierrez	Att'y, 2007 J.D.	2015-2016	25.0	$500	$12,500.00
Jonathan Smith	Att'y, 2012 J.D.	2015-2020	875.8	$400	$350,320.00
Heather Lewis	Att'y, 2013 J.D.	2017-2019	23.6	$350	$8,260.00
Michael Youhana[6]	2019 J.D.	2019-2020	39.5	$200	$7,900.00
Various Clerks	Law Clerk	2015-2020	377.2	$190	$71,668.00
Alok Disa	Paralegal	2015-2018	154.1	$100	$15,410.00
Mariana Lo	Paralegal	2015-2020	64.5	$100	$6,450.00
Other Paralegals	Paralegal	2018	8.2	$100	$820.00
			Total Fees		$1,107,758.00
			Reimbursable Expenses		$11,050.41
				TOTAL	$1,118,808.41

CONCLUSION

Plaintiffs seek an award of attorney's fees and costs under EAJA in the total amount of $1,118,808.41. This request will be fully briefed and presented at a later date pursuant to a stipulation between Plaintiffs and the Defendants.

Respectfully submitted this 23rd day of December, 2020.

EARTHJUSTICE

By: */s/ Suzanne Novak*

[5] This is the total number of hours for which Plaintiffs seeks compensation. It already reflects a reduction of a significant number of hours in the exercise of billing judgment and in consideration of other factors from the total number of hours actually spent on the various aspects of the case by Plaintiffs' counsel.

[6] Michael Youhana's swearing-in ceremony is on January 18, 2021; consequently, his hourly rate reflects his non-barred status during his work on this case.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
March 1, 2021

Lyle W. Cayce
Clerk

No. 17-60836

TEXAS ASSOCIATION OF MANUFACTURERS; TEXAS CHEMICAL COUNCIL; TEXAS ASSOCIATION OF BUSINESS; NATIONAL ASSOCIATION OF MANUFACTURERS; AMERICAN CHEMISTRY COUNCIL,

Petitioners

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

Respondent

On Petition for Review of an Order of the
Consumer Product Safety Commission

Before OWEN, Chief Judge, and SOUTHWICK and HIGGINSON, Circuit Judges.

PRISCILLA R. OWEN, Chief Judge:

Pursuant to the Consumer Product Safety Improvement Act (CPSIA), the Consumer Product Safety Commission was tasked with studying the effects of phthalates in children's toys and child care articles. The Commission issued a final rule prohibiting the manufacture and sale of any children's toy or child care article that contains concentrations of more than 0.1 percent of any one of five phthalates. Petitioners seek direct review in this court, arguing

that the Commission failed to give an adequate opportunity for comment, failed to apply the proper procedural standards, redefined the substantive standards, and arbitrarily and capriciously applied the scientific data. The Commission moves to dismiss or transfer the case for lack of jurisdiction. We hold that we have jurisdiction to review the rule and that the Commission procedurally erred in promulgating the final rule. In other respects, we affirm, and we remand to the Commission.

I

In 1972, Congress enacted the Consumer Product Safety Act (CPSA)[1] in order to "protect the public against unreasonable risks of injury associated with consumer products."[2] The CPSA established the Consumer Product Safety Commission,[3] which "promulgate[s] consumer product safety standards"[4] and declares when a product is a "banned hazardous product."[5]

In 2008, Congress enacted the Consumer Product Safety Improvement Act (CPSIA),[6] which, among other things, directed the Commission to promulgate rules banning or regulating the use of phthalates in children's toys and child care articles.[7] Phthalates are "a class of organic compounds used primarily" to soften and add flexibility to plastic.[8] Some phthalates have antiandrogenic effects—that is, they affect the male reproductive system and can suppress the production of testosterone and normal development.[9]

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[1] Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (codified as amended at 15 U.S.C. §§ 2051-2089).

[2] 15 U.S.C. § 2051(b).

[3] 15 U.S.C. § 2053.

[4] 15 U.S.C. § 2056.

[5] 15 U.S.C. § 2057.

[6] Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (codified as amended in scattered sections of 15 U.S.C. §§ 2051-2089).

[7] *See, e.g.*, 15 U.S.C. §§ 2056a, 2056b, 2057c.

[8] Prohibition of Children's Toys and Child Care Articles Containing Specified Phthalates, 79 Fed. Reg. 78,324, 78,324 (December 30, 2014) ("Proposed Rule").

[9] Proposed Rule at 78,324; 78,326.

Congress addressed phthalates in three relevant ways. First, the CPSIA made it unlawful to "manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children's toy or child care article that contains concentrations of more than 0.1 percent" of three phthalates: di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), and benzyl butyl phthalate (BBP).[10] Second, the CPSIA included an interim prohibition on "any children's toy that can be placed in a child's mouth or child care article that contains concentrations of more than 0.1 percent" of three other phthalates: diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP).[11] Third, the CPSIA directed the Commission to promulgate a final rule regarding phthalates.[12] By its terms, the interim prohibition remained in place until the Commission promulgated a final rule.[13]

To aid the rulemaking process, Congress directed the Commission to appoint a Chronic Hazard Advisory Panel (CHAP) to "study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles."[14] The CHAP was charged with examining "the full range of phthalates that are used in products for children"[15] and then preparing a report for the Commission with its findings and recommendations.[16] After receiving the CHAP's report, the Commission was directed to:

> (A) determine, based on such report, whether to continue in effect [the interim prohibition], in order to ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals with an adequate margin of safety; and

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[10] 15 U.S.C. § 2057c(a).
[11] *Id.* § 2057c(b)(1).
[12] *Id.* § 2057c(b)(3).
[13] *Id.* § 2057c(b)(1).
[14] *Id.* § 2057c(b)(2)(A).
[15] *Id.* § 2057c(b)(2)(B).
[16] *Id.* § 2057c(b)(2)(C).

> (B) evaluate the findings and recommendations of the [CHAP] and declare any children's product containing any phthalates to be a banned hazardous product under section 8 of the [CPSA], as the Commission determines necessary to protect the health of children.[17]

Pursuant to the CPSIA, the Commission appointed a CHAP,[18] which assessed the risks of phthalates in combination and in isolation.[19] For its cumulative risk assessment, the CHAP employed a hazard index (HI).[20] To determine the HI, the CHAP first calculated the hazard quotient (HQ) for each phthalate by dividing the actual exposure to a particular phthalate by an estimate of the level of exposure that would generally be acceptable.[21] An HQ greater than one might cause "concern for antiandrogenic effects in the exposed population due to the effect of an individual phthalate."[22] Then, the CHAP combined the HQs of the individual phthalates to determine the cumulative HI.[23] The effects of active phthalates are additive in that doses of different phthalates can combine to produce effects.[24] Accordingly, if an individual's cumulative HI is greater than one, "there may be concern for antiandrogenic effects."[25]

To determine the level of exposure that is acceptable or "negligible," the CHAP relied on three case studies examining the effects of phthalates in rodents.[26] Next, the CHAP divided the no-effect level in rodents by ten to

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[17] *Id.* § 2057c(b)(3).

[18] Proposed Rule at 78,325.

[19] Prohibition of Children's Toys and Child Care Articles Containing Specified Phthalates, 82 Fed. Reg. 49,938, 49,957 (Oct. 27, 2017) (codified at 16 C.F.R. § 1307) ("Final Rule").

[20] Proposed Rule at 78,327.

[21] *Id.* at 78,328.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 78,326.

[25] Final Rule at 49,957.

[26] Proposed Rule at 78,326; *see* Final Rule at 49,951.

extrapolate from rodents to humans.[27] Due to the differences in how members of the same species may react to a chemical, the CHAP divided that number by ten again.[28] As a result, the CHAP used a no-effect level for humans that was 100 times lower than that for rodents.

The CHAP used data from three surveys to determine how much exposure humans actually have to phthalates, two involving human-biomonitoring (HBM) and one involving exposure scenario analysis.[29] First, the CHAP used the Department of Heath and Human Services' National Health and Nutrition Examination Survey (NHANES).[30] The NHANES is an HBM survey that measures phthalates and other chemicals in human urine and blood based on spot sampling of pregnant women.[31] For the second study, the CHAP used the Study for Future Families (SFF), an HBM study of mother-child pairs before and after birth by the National Institutes for Health and the Environmental Protection Agency.[32] Finally, the CHAP relied on a scenario-based method to provide information on sources of exposure.[33]

The Commission responded to general comments about its use of HBM data collected via spot sampling, concluding that it could extrapolate average daily exposure based on the spot sampling data.[34] More specifically, the Commission maintained that the spot samples were collected at different sites, at different times of day, and on different days of the week, and participants were selected randomly, and therefore, the data is representative of "estimated

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[27] Final Rule at 49,952.
[28] *Id.*
[29] Proposed Rule at 78,327.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Final Rule at 49,955.

population per capita phthalate exposure across the 2-year NHANES cycle."[35] Spot tests cannot differentiate between sources of phthalates, and most studies conclude that "food, rather than children's toys or child care articles, provides the primary source of exposure."[36] Moreover, phthalates are metabolized quickly and the amount of phthalates detected "depends to a large extent on . . . how long it has been since the last meal."[37] Applying the NHANES and SFF data, the CHAP determined that "up to 10 percent of pregnant women and up to 5 percent of infants" had an HI greater than one.[38]

The CHAP recommended that the Commission lift the interim prohibition on two phthalates—DIDP and DnOP.[39] Those phthalates did not contribute to the HI.[40] However, the CHAP recommended that the Commission (1) issue a permanent prohibition for DINP at levels greater than 0.1 percent in all children's toys and child care articles, not just toys that can be placed in a child's mouth;[41] and (2) issue a permanent prohibition on children's toys and child care articles containing diisobutyl phthalate (DIBP), di-n-pentyl phthalate (DPENP), di-n-hexyl phthalate (DHEXP), and dicyclohexyl phthalate (DCHP) at levels greater than 0.1 percent.[42] DIBP, DPENP, DHEXP, and DCHP were not prohibited by the CPSIA, but the CHAP

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[35] *Id.*

[36] Proposed Rule at 78,327.

[37] Minutes of Commission Meeting Re: Final Phthalates Rules, Index No. 462 (Oct. 18, 2017) (Statement of Comm'r A. Buerkle), https://www.cpsc.gov/s3fs-public/ACHBuerklesPhthalatesfinalrulestatement10302017.pdf?1N0bigFnYyn_CGtgCEGQZJrjTnsjv3RO; see also CHAP at 75, https://www.cpsc.gov/s3fs-public/CHAP-REPORT-With-Appendices.pdf.

[38] Proposed Rule at 78,328.

[39] *Id.* at 78,329-30.

[40] *See id.*

[41] *Id.* at 78,329.

[42] *Id.* at 78,330.

concluded that "they contribute to the cumulative risk" and should be prohibited permanently.[43]

The Commission issued a proposed rule (Proposed Rule) that implemented the CHAP's recommendations.[44] In explaining its rationale for the Proposed Rule, the Commission agreed with the CHAP that "the acceptable risk is exceeded when the HI is greater than one."[45] Accordingly, the Commission decided that an HI less than one "is necessary 'to ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals with an adequate margin of safety.'"[46] The Commission found it particularly pertinent that the HI was greater than one for ten percent of pregnant women, and the HI at the 95th percentile was five.[47]

After publication of the Proposed Rule, the NHANES released updated data sets.[48] Using the new data, the Commission had its staff "replicate the CHAP's methodology."[49] However, unlike the CHAP, which studied pregnant women, the staff "used women of reproductive age" (WORA) due to a lack of data on pregnant women.[50] The staff found that the risk decreased with the updated data.[51] The HI at the 95th percentile was now less than one.[52] The staff estimated that, using the updated data, between 98.8 and 99.6 percent of WORA had HIs less than or equal to one.[53] The staff was "unable to estimate

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[43] *Id.* It also appears that DPENP, DHEXP, and DCHP were not included in the HI metric. *Id.* at 78,328 (Table 1 "summarized" the CHAP's findings and did not include those phthalates.).

[44] *Id.* at 78,343.

[45] *Id.* at 78,334.

[46] *Id.*

[47] *See, e.g.*, *id.* at 78,328, 78,332-33.

[48] Final Rule at 49,939.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 49,958.

[52] *Id.*

[53] *Id.*; *see also id.* at 49,963 ("CPSC staff determined that approximately 99 percent of WORA in the U.S. population now have an HI less than or equal to one.").

the percentage of WORA with an HI greater than one,"[54] but noted that "between two and nine real women from the sample of 538 WORAs had an HI greater than one."[55]

The Commission concluded that "phthalate exposures and risks in WORA probably underestimate the risks to infants and children" because "infants' exposures generally are two- to threefold greater than adults."[56] The Commission also noted that exposure to DINP increased "approximately five-fold" since the CHAP's report, despite the decrease in exposure to phthalates on the whole.[57] Based on the new data, the Commission, by a 3-2 vote,[58] promulgated a final rule (Final Rule) substantively identical to the Proposed Rule.[59] The Final Rule prohibits "the manufacture for sale, offer for sale, distribution in commerce, or importation into the United States of any children's toy or child care article that contains concentrations of more than 0.1 percent of [DINP], [DIBP], [DPENP], [DHEXP], and [DCHP]."[60] To summarize, the Final Rule (1) makes the CPSIA's interim prohibition on DINP permanent, (2) extends the scope of the CPSIA's interim prohibition on DINP to "any children's toy or child care article," and (3) prohibits four phthalates not prohibited by the CPSIA: DIBP, DPENP, DHEXP, and DCHP.[61]

Petitioners, trade associations representing chemical manufacturers, now seek direct review in this court. Natural Resources Defense Council, Inc., Environmental Justice Health Alliance for Chemical Policy Reform, and

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[54] *Id.* at 49,958.
[55] *Id.* at 49,961.
[56] *Id.* at 49,958.
[57] *Id.* at 49,963.
[58] *Id.* at 49,938 n.1.
[59] *Id.* at 49,982.
[60] *Id.*
[61] *Compare id., with* 15 U.S.C. § 2057c(b)(1).

Breast Cancer Prevention Partners (Intervenors) intervened in support of the Final Rule.

II

As a threshold matter, we address two challenges to our jurisdiction. Intervenors assert that the Petitioners lack standing to pursue these claims. The Commission also moved to dismiss this action, arguing that we lack jurisdiction because the Final Rule is not a "consumer product safety rule," and we therefore lack statutory authorization for direct review.

A

Petitioners bear the burden of showing they have standing for each type of relief sought.[62] To establish standing to seek injunctive relief, the plaintiff must show

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[63]

Petitioners are five trade associations that seek to establish standing using a theory of associational standing. Associations may assert the standing of their own members.[64] "An association has standing to bring a suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[65] The only issue in this case is whether

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[62] *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

[63] *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

[64] *Summers*, 555 U.S. at 494.

[65] *Friends of the Earth*, 528 U.S. at 181.

any member of the Petitioner associations has standing to bring the claim in its own right.

According to Intervenors, Petitioners have not established that "at least one identified member ha[s] suffered or would suffer harm" from the Final Rule. In response, Petitioners attached to their Reply Brief an additional affidavit by Christopher Wallace, an employee of ExxonMobil Chemical Company (EMCC). EMCC is a member of Texas Chemical Council (TCC), one of the Petitioners. Even without the additional affidavit, the record demonstrates that EMCC is a producer of DINP. It is less clear, however, whether EMCC manufactures DINP for the use in products that will become children's toys or child care articles. The record does not contain any indication that EMCC's products are used or have been used in children's toys or child care articles. The injury need not be actualized; a threatened injury suffices if it is "real, immediate, and direct."[66] A high risk of economic injury is sufficiently real, immediate, and direct.[67] The Supreme Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions.[68] While the issue is a close one, we are satisfied that the threat of reduced sales to companies that manufacture children's toys and child care articles is sufficiently concrete that EMCC, and by proxy TCC, has standing to challenge the Final Rule as it relates to DINP.

Petitioners further argue that they have standing because of the "stigma" inflicted by the Final Rule. According to one affidavit, in response to pressure from groups citing the Commission's rulemaking process, major flooring retailers announced they would no longer carry flooring tile that

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[66] *Davis v. Federal Election Com'n*, 554 U.S. 724, 734 (citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

[67] *Pac. Gas & Elec. Co. v. FERC*, 106 F.3d 1190, 1195 (5th Cir. 1997).

[68] *Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (quoting 3 K. Davis & R. Pierce, Administrative Law Treatise 13-14 (3d ed. 1994)).

contains phthalates. EMCC experienced losses in its flooring market revenue that it attributes to the Final Rule. Petitioners argue that we should apply the same standards as the D.C. Circuit when assessing whether these facts support standing.[69] In *Tozzi*, the Department of Health and Human Services published a revised list of substances known or reasonably anticipated to cause cancer and upgraded the chemical "dioxin" from "reasonably anticipated" to "known."[70] The petitioner, a manufacturer of medical devices that emit dioxin when incinerated, sued to vacate the rule.[71] The D.C. Circuit held that the petitioner had standing because the agency's action was a "substantial factor" in the decisions of purchasers to reduce or end purchases of PVC plastics contained in the petitioner's devices.[72] Further, the court noted that "[w]hen the government attaches an inherently pejorative and damaging term such as 'carcinogen' to a product, the probability of economic harm increases exponentially."[73]

According to Petitioners, CPSC's decision to prohibit certain phthalates from children's toys and child care articles is likewise a "substantial factor" in causing EMCC's economic injury. We agree. EMCC's evidence of lost sales sufficiently demonstrates an injury in fact traceable to the Final Rule. Accordingly, TCC has demonstrated that it has standing to challenge the Final Rule as it relates to DINP. Even though the other petitioners have not named members that manufacture the prohibited phthalates, the presence of one petitioner with standing is sufficient for Article III purposes.[74]

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[69] *See Tozzi v. United States Dep't of Health and Human Servs.*, 271 F.3d 301 (2001).
[70] *Id.* at 303.
[71] *Id.* at 306-08.
[72] *Id.* at 309.
[73] *Id.*
[74] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

However, standing is not dispensed in gross; plaintiffs must demonstrate standing "for each claim [t]he[y] seek[] to press" and "for each form of relief that is sought."[75] Defining a "claim" in this context is somewhat elusive.[76] For example, the Supreme Court in *Blum v. Yaretsky* held that plaintiffs had standing to challenge one aspect of the Medicaid Act but not others.[77] In *Blum*, nursing home patients brought suit after the state of New York determined that they no longer needed the care they were receiving and should be transferred to a lower level of care.[78] The Court agreed that the patients had standing to challenge the decision to transfer them to a lower level of care but held that they could not challenge the procedures for transferring patients to higher levels of care because "[n]othing in the record . . . suggest[ed] that any of the individual respondents [had] been" transferred to higher care, and "assessing the possibility now would 'tak[e] [the Court] into the area of speculation and conjecture.'"[79]

On the other hand, in *Davis v. Federal Election Commission*, a candidate had standing to challenge both the asymmetrical contribution limitations under § 319(a) of the Bipartisan Campaign Reform Act of 2002[80] and the disclosure requirements under § 319(b) when the record indicated that the limits likely would have applied to the candidate.[81] Section 319 created rules

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[75] *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008) (internal quotation marks omitted) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

[76] *See* 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRACTICE & PROC.§ 3531.16 Scope Of Standing, (3d ed.) ("It is easy enough to agree that a challenge to a state tax abatement is a claim separate from a challenge to a municipal tax abatement. Equally easy distinctions will be drawn in other cases. But still other cases will present difficult line-drawing challenges.").

[77] 457 U.S. 991 (1982).

[78] *Id.* at 995.

[79] *Id.* at 1001 (third alteration in original) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

[80] 116 Stat. 109 (codified at 52 U.S.C. § 30117).

[81] *Davis*, 554 U.S. at 733-35.

that applied to self-funding candidates contributing more than $350,000 of their own funds to the campaign.[82] The candidate intended to contribute more than $350,000 and made the disclosures required by subsection (b), giving him standing to challenge that provision.[83] The Federal Election Commission argued that the candidate did not have standing to challenge the asymmetrical contribution limits because they did not apply at the outset of the suit or at any point in time during the race at issue.[84] The Court held that there was a sufficient probability that the asymmetrical contribution limits would apply, and accordingly the candidate could challenge both provisions.[85]

The Ninth Circuit has held that an Americans with Disabilities Act plaintiff who was impeded by obstacles at one store could challenge all the obstacles to his mobility at that store, even the ones he was not aware of at the time he brought the suit.[86] That decision relied partially on the Supreme Court's instructions that courts take a "broad view of constitutional standing in civil rights cases," but the decision focused on whether the plaintiff had a sufficient personal stake "as to assure that concrete adverseness which sharpens the presentation of issues" upon which the court must rule.[87]

In an analogous case, the D.C. Circuit held that plaintiffs had standing to challenge every aspect of a Bureau of Land Management (BLM) decision that aggrieved them.[88] In *WildEarth Guardians*, an environmental group challenged the BLM's decision to issue a lease to mine federal lands in Wyoming, arguing that the mine would injure their aesthetic and recreational

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[82] 52 U.S.C. § 30117(a)(1).
[83] *Davis*, 554 U.S. at 733.
[84] *Id.* at 734.
[85] *Id.* at 734-35.
[86] *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1041-44 (9th Cir. 2008).
[87] *Id.* at 1043 (citations omitted).
[88] *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013)

interests.[89] Plaintiffs claimed a procedural injury, alleging that the Environmental Impact Statement (EIS) was deficient in its consideration of local pollution and global greenhouse gas emissions.[90] The district court and the D.C. Circuit agreed that plaintiffs had standing to challenge the EIS with respect to local pollution because "the local pollution that causes their members' aesthetic and recreational injuries follows inexorably from the decision to authorise leasing" on the tract.[91] The district court held that the organization did not have standing to challenge the global greenhouse emissions because those emissions did not affect the aesthetic and recreational interests; the circuit court disagreed.[92] According to the D.C. Circuit, the plaintiffs could challenge any alleged deficiencies in the EIS because their injuries were "caused by the allegedly unlawful [lease] and would be redressed by vacatur of the [lease] on the basis of any of the procedural defects identified in the [EIS].[93]

Applying these principles, EMCC has standing to bring its challenge to the Final Rule. The possibility of reduced sales of DINP along with the stigmatic effect of the rule provides standing to pursue its claim. Those injuries were caused by an allegedly unlawful rule and would be redressed by vacatur of the rule on the basis of any of the grounds raised. Further, the claim that CPSC violated various procedural requirements, if successful, would require us to grant relief that would apply to the entirety of the Final Rule, as the portions of the Final Rule pertaining to each individual phthalate are the result of the same administrative decision-making process.

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[89] *Id.* at 302.
[90] *Id.* at 305-06.
[91] *Id.* at 306.
[92] *Id.* at 306-07.
[93] *Id.* at 308.

B

Federal courts of appeals are courts "of limited subject matter jurisdiction . . . authorized to review decisions and orders of administrative agencies only as provided by acts of Congress."[94] Section 2060(a) of the CPSA provides that "[n]ot later than 60 days after a consumer product safety rule is promulgated by the Commission," a person may file a petition for "judicial review of such rule" in the court of appeals.[95] The parties contest whether the Final Rule is a "consumer product safety rule" subject to the § 2060(a)'s procedure for judicial review.

Section 2052(a)(6) of the CPSA defines a "consumer product safety rule" as "a consumer products safety standard described in section 2056(a) of this title, or a rule under this chapter declaring a consumer product a banned hazardous product."[96] In its phthalate provisions, the CPSIA provides that "any rule promulgated under [§ 2057c](b)(3) shall be considered consumer product safety standards under the [CPSA]."[97] The Final Rule was promulgated under § 2057c(b)(3),[98] so, pursuant to the CPSIA, it is a consumer product safety standard under the CPSA.[99] As a consumer product safety standard, the Final Rule is a consumer product safety rule as defined in § 2052(a)(6). The Final Rule is consequently subject to the procedures for judicial review established by § 2060(a).[100] We have jurisdiction to review the Final Rule.

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[94] *Xavier Univ. v. Nat'l Telecomms.*, 658 F.2d 306, 307 (5th Cir. Unit A 1981) (citations omitted).

[95] 15 U.S.C. § 2060(a).

[96] 15 U.S.C. § 2052(a)(6).

[97] 15 U.S.C. § 2057c(f).

[98] Final Rule at 49,940.

[99] *See* 15 U.S.C. § 2057c(f).

[100] 15 U.S.C. § 2060(a).

Each of the Commission's arguments to the contrary is unavailing. First, the Commission argues that the Final Rule is not a consumer product safety standard *described in section 2056(a).* That argument ignores that the Final Rule is statutorily defined to be a consumer product safety rule. The Commission's other main argument is that Congress only intended phthalate rules to be consumer product safety rules for purposes of preemption. The subsection of the CPSIA at issue is titled "Treatment as consumer product safety standards; effect on State laws."[101] The subsection's first sentence provides that "any rule[s] promulgated under subsection (b)(3)," including the Final Rule, "shall be considered consumer product safety standards."[102] The second sentence states that "[n]othing in this section or the [CPSA] shall be construed to preempt or otherwise affect any State requirement with respect to any phthalate alternative not specifically regulated in a consumer product safety standard under the [CPSA]."[103] Congress clearly contemplated that it was both defining phthalate rules as consumer product safety standards *and* expressing the scope of preemption. The Commission's argument to the contrary is without merit. Further, the Commission considers the Final Rule to be a consumer product safety standard for purposes of testing and certification requirements under the CPSA.[104] The Commission cannot have its cake and prevent our review by relying on the same provision. The Final Rule is defined by Congress as a consumer product safety standard, and we have jurisdiction to review it.

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[101] 15 U.S.C. § 2057c(f).

[102] *Id.*

[103] *Id.*

[104] See 82 Fed Reg 49,767, 49,768 ("The Commission's phthalates rule is considered a 'consumer product safety standard.' 15 U.S.C. 2063c(f).") The Commission cited to 2063c(f) for this proposition but that statute does not exist. Presumably, the Commission meant to cite to § 2057c(f), which defines the phthalate rule as a consumer product safety standard.

III

Petitioners ask the court to set aside the Final Rule because, in their view, the Commission failed to give an adequate opportunity to comment on the rulemaking, failed to apply the proper procedural standards, redefined the substantive standards, and arbitrarily and capriciously applied the scientific data. We address each in turn and hold that the Commission procedurally erred by not providing an adequate opportunity to comment on the rule and by failing to consider the costs of a portion of the rule.

A

Petitioners argue that the Commission did not provide an adequate opportunity to comment on its use of data at the 99th percentile to justify its prohibition. The APA requires agencies to publish a notice of proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[105] Final rules under APA notice-and-comment rulemaking must be the "logical outgrowth" of the proposed rule.[106] The objective is fair notice.[107] "If interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period, then the rule is deemed to constitute a logical outgrowth of the proposed rule."[108]

Petitioners do not object to a substantive change in the text of the Proposed Rule and the Final Rule, but to the change in the justification for the

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[105] 5 U.S.C. § 553(b)(3).

[106] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (citations omitted); *see also ConocoPhilips Co. v. EPA*, 612 F.3d 822, 834 (5th Cir. 2010) (citation omitted).

[107] *Long Island*, 551 U.S. at 174.

[108] *American Coke & Coal Chemicals Inst. v. EPA*, 452 F.3d 930, 938-39 (D.C. Cir. 2006) (citing *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).

Proposed Rule and the justification for the Final Rule. The Commission's primary justification for the Proposed Rule was data demonstrating that ten percent of pregnant women had an HI greater than one, which exceeded the acceptable risk, and that the average HI was five at the 95th percentile.[109] However, when the Commission examined the updated data released after the publication of the Proposed Rule, it found that the risk of antiandrogenic effects had decreased, and that the HI at the 95th percentile had decreased from five to less than one.[110] The Commission could not determine exactly what percentage of the women studied had an HI greater than one,[111] but did state that "between two and nine real women from the sample of 538 WORAs had an HI greater than one."[112] The Commission relied on this new data when promulgating the Final Rule.[113]

According to Petitioners, the Commission did not provide fair notice when it changed its justification for the prohibition from data showing that the average HI was greater than one in the 95th percentile to data including individual spot samples with HIs greater than one.[114] We agree. The Commission's justification for the Proposed Rule was based on data showing that a statistically stable percentage of the women studied had an HI that indicated an unacceptably high risk of antiandrogenic effects. After new data became available, the Commission replicated the CHAP's methodology and determined that there were too few samples with an HI above one to estimate the number of women and children in the general population who are

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[109] Proposed Rule at 78,328, 78,334.
[110] Final Rule at 49,958.
[111] *Id.*
[112] *Id.* at 49,961.
[113] *Id.*
[114] *Compare* Proposed Rule at 78,328, *with* Final Rule at 49,961.

negatively affected by the phthalates at issue.[115] Because the Commission could no longer justify the rule based on the ten percent of women who had risky exposures, it justified the Final Rule because between two and nine individual samples had HIs deemed unacceptable.

The Commission provided some notice that it was relying on new data and asked for comments.[116] One commenter objected to the use of spot checks at the 99th percentile, and the Commission responded to that comment.[117] The Commission argues that the public was therefore aware that it was "considering the matter," and the Commission provided sufficient notice under the APA.[118] We disagree. The agency's rationale for the rule must be made clear and subjected to public comment.[119] In the notices to which the Commission refers, statements about statistically unstable data dominate, and any reference to spot samples is not clearly communicated as a new justification to support the rule and supplant the unstable statistical analysis.[120] Thus, while the Commission did provide some opportunity for comment on its reliance on spot samples, it did not make clear it was inviting comments on the use of spot samples as a new justification for why the Final Rule is necessary to protect the health of children. The fact that one commenter suggested that data above the 95th percentile is too unstable for rulemaking does not relieve the Commission of its burden to provide notice and

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[115] *See* 80 Fed. Reg. 35,938 (June 23, 2015); 82 Fed. Reg. 11,348 (Feb. 22, 2017).
[116] *See* 80 Fed. Reg. 35,938; 82 Fed. Reg. 11,348.
[117] Final Rule at 49,961.
[118] *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007).
[119] *See Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1212 (5th Cir. 1991).
[120] *See* 80 Fed. Reg. 35,938; 82 Fed. Reg. 11,348.

an opportunity to comment on the clearly articulated justification for its use of such data.[121]

Because it was justified with reference to individual spot samples rather than an estimable percentage of the population that had potentially harmful exposure to the phthalates in question, the Final Rule is not a logical outgrowth of the Proposed Rule. As one of the commissioners pointed out, that change in methodology—whether right or wrong—was not reasonably foreseeable based on the Proposed Rule.[122] Accordingly, the Commission violated the APA's notice-and-comment procedures by not adequately allowing for comment after it changed its primary justification for the rule but before adopting a final rule.

B

Petitioners argue that the Final Rule declares five phthalates to be "banned hazardous products" under § 2057c and consequently should have complied with § 2057's requirements for such a ban. This argument is premised on § 2057c(b)(3)(B), which empowers the Commission to "declare any children's product containing any phthalates to be a banned hazardous product under Section 8 of the Consumer Product Safety Act (15 U.S.C. 2057)."[123] We review the Commission's actions under the familiar framework of *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*[124]

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[121] *See Fertilizer Inst. V. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) ("The fact that some commenters actually submitted comments suggesting the creation of administrative exemptions is of little significance.").

[122] Minutes of Commission Meeting Re: Final Phthalates Rules, Index No. 462, at 23 (Oct. 18, 2017) (Statement of Comm'r J. Mohorovic).

[123] 15 U.S.C. § 2057c(b)(3)(B).

[124] *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Michigan v. E.P.A.*, 135 S.Ct. 2699, 2707 ("*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers.").

The Commission may ban a consumer product under § 2057 when it finds that the product presents an unreasonable risk of injury and "no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product."[125] Section 2057 in turn requires the Commission to comply with § 2058 when declaring products "banned hazardous products."[126] The Commission indisputably did not comply with § 2058, which requires, among other things, findings as to: (1) "the degree and nature of the risk of injury," (2) the approximate number of products subject to the rule, and (3) "any means of achieving the objective of the order while minimizing adverse effects on competition."[127]

The Commission argues that it was not required to comply with § 2058 because it was authorized to promulgate the Final Rule by the CPSIA, which contains its own detailed requirements for rulemaking in § 2057c(b)(3). Section 2057c(b)(3) directs that "the Commission shall, pursuant to section 553 of Title 5, promulgate a final rule."[128] Section 553 of Title 5 sets forth the general notice-and-comment rulemaking process under Administrative Procedures Act (APA).[129] In addition, § 2057c(b)(3)(B) directs the Commission to "evaluate the findings and recommendations of the [CHAP]" and ban products containing phthalates "as the Commission determines necessary to protect the health of children."[130] According to the Commission, the specific

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[125] 15 U.S.C. § 2057.
[126] *Id.*
[127] 15 U.S.C. § 2058.
[128] 15 U.S.C. § 2057c(b)(3).
[129] *See* 5 U.S.C. § 553.
[130] 15 U.S.C. § 2057c(b)(3).

controls over the general,[131] and the specific requirements contained in § 2057c(b)(3) are incompatible with the requirements imposed by § 2058. Further, the Commission argues that if there is ambiguity, its interpretation is entitled to *Chevron* deference.

The Commission's reading of § 2057c is correct. Rather than direct the Commission to follow its general rulemaking procedures, § 2057c(b)(3) authorizes rulemaking under the APA's notice-and-comment procedures. The standard for promulgating rules is also different—whereas § 2058 requires the Commission to find that a product poses "an unreasonable risk of injury" before promulgating a rule,[132] § 2057c(b)(3)(B) requires the Commission to promulgate a phthalate rule on a finding that the rule is "necessary to protect the health of children."[133] Further, § 2057c(b)(3)(A) empowers the Commission to promulgate a rule continuing Congress's interim prohibition "to ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals with an adequate margin of safety."[134] While there may be substantial overlap in the standards imposed by § 2057c(b)(3) and § 2058, Congress phrased the standards differently, indicating that Congress intended the standards in § 2057c(b)(3) to apply instead of the standards laid out in § 2058. The Commission did not procedurally err in promulgating the Final Rule pursuant to § 2057c(b)(3).

C

Alternatively, Petitioners argue that the Commission ignored statutory standards for rulemaking and instead promulgated rules to provide "absolute

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[131] *See United States v. Marshall*, 798 F.3d 296, 318 (5th Cir. 2015) ("[I]t is familiar law that a specific statute controls over a general one.") (internal quotation marks omitted) (quoting *Bulova Watch. Co. v. United States*, 365 U.S. 753, 758 (1961)).

[132] 15 U.S.C. § 2058.

[133] 15 U.S.C. § 2057c(b)(3)(B).

[134] *Id.* § 2057c(b)(3)(A).

certainty of no risk." Subsection (A) empowers the Commission to continue the interim prohibition on DINP "to ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals with an adequate margin of safety."[135] Subsection (B) of § 2057c(b)(3) empowers the Commission to ban children's products containing phthalates as "necessary to protect the health of children."[136] According to Petitioners, the Commission misread these two separate standards together as a mandate to "demand an absolute certainty of no risk."

In its description of the rationale behind the Final Rule, the Commission cited the standards in § 2057c(b)(3)(A) and (B).[137] In promulgating the specific prohibitions, it referred to the standards applicable to its decision on each phthalate. The Commission continued the prohibition on DINP because the prohibition is "still necessary to 'ensure a reasonable certainty of no harm' to children and pregnant women with an 'adequate margin of safety.'"[138] The Commission also extended the prohibition to all "children's toy and child care articles," not just those "that can be placed in a child's mouth," because it found that such a rule was necessary both "to ensure a reasonable certainty of no harm and to protect the health of children."[139] When the Commission determined that it was not necessary to continue the interim prohibition on DNOP and DIDP, it properly employed the "reasonable certainty of no harm" standard.[140] Finally, the Commission referred to the "necessary to protect the

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[135] *Id.*

[136] *Id.* § 2057c(b)(3)(B).

[137] Final Rule at 49,938; 49,957 ("to meet the CPSIA's criteria of reasonable certainty of no harm and protection of the health of children, it is necessary to prohibit children's toys and child care articles containing concentrations of more than 0.1 percent of . . . DINP, DIBP, DPENP, DHEXP, and DCHP").

[138] *Id.* at 49,966.

[139] *Compare id.* at 49,966-67, *with* 15 U.S.C. § 2057c(b)(1).

[140] Final Rule at 49,968.

health of children" standard when it finalized its ban on DIBP, DPENP, DHEXP, and DCHP.[141]

1

Petitioners contend that the Commission exceeded its mandate to protect against "harm" and instead issued a Final Rule that protected against "risk." Risk is "the chance of injury, damage, or loss."[142] Harm, on the other hand, is actual "[i]njury, loss, damage[,] [or] material or tangible detriment."[143] According to Petitioners, the Commission overprotected consumers by prohibiting products with phthalates based on evidence of risk, not harm.

We disagree. Adopting the standard used in the CHAP report, the Commission interpreted the phrase "necessary to protect the health of children" to require "an HI less than or equal to one."[144] The Proposed Rule explained:

> If the HI is greater than one, there may be a concern for antiandrogenic effects in the exposed population due to the cumulative effects of phthalates. . . . Having a HI greater than one does not necessarily mean that adverse effects will occur; however, this possibility cannot be ruled out.[145]

Accordingly, the Commission determined that preventing exposure to an HI greater than one was necessary to ensure that adverse effects—i.e., harm—will not occur. The HI method itself is not controversial, though Petitioners argue that the Commission was overly conservative in setting the benchmark.

Petitioners also argue that Congress required only "reasonable certainty," not "absolute certainty." In Petitioners' view, the Commission

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[141] *Id.* at 49,969-70.

[142] *Risk,* BLACK'S LAW DICTIONARY (10th Ed. 2014)*; see Risk*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th Ed. 2009) (defining "risk" as "the possibility of loss or injury").

[143] *Harm*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[144] Final Rule at 49,968.

[145] Proposed Rule at 78,328 & n.8.

exceeded this mandate when it (a) considered risks at or above the 99th percentile of spot samples, and (b) did not consider costs of the regulation to determine whether the regulation could prevent harm "with reasonable certainty."

Both parties agree that statistical data above the 99th percentile is not stable, i.e., is not reliable.[146] Petitioners argue that the Commission initially relied on scientifically valid 95th-percentile data and then moved the goalposts when there was not significant risk at that level.[147] The Commission responded to this argument in its Final Rule, asserting that the instability at the 99th percentile "mean[s] that [the Commission is] precluded from estimating the precise number of WORA with HIs greater than one in the larger population from which the sample was selected."[148] Instead, the Commission urges that the rule is "not based on any particular percentile, but on the observation that actual women from the NHANES sample have HIs greater than one."[149]

In the abstract, protecting the 99th percentile from harm is not per se unreasonable and may be required by subsection (A). The Commission is required to continue the interim prohibition on DINP to "ensure a reasonable certainty of no harm . . . with an adequate margin of safety."[150] The District of Columbia Circuit recently examined the meaning of a comparable requirement to provide an "ample margin of safety" in *Sierra Club v. EPA*.[151] The EPA had been authorized to set a health threshold for acid gases that included an

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[146] *See* Final Rule at 49,961.
[147] *See* Proposed Rule at 78,328, 78,332-33.
[148] Final Rule at 49,961.
[149] *Id.*
[150] 15 U.S.C. § 2057c(b)(3)(A).
[151] 895 F.3d 1, 12-13 (D.C. Cir. 2018).

"ample margin of safety."[152] The EPA employed a model based on conservative assumptions, including worst-case weather and worst-case population proximity, and set a standard that resulted in most of the country having a hazard quotient of below one (the level at which there was a risk to human health).[153] However, in the model, the EPA projected that some people would be exposed to the regulated gases if both worst-case scenarios came to pass.[154] The D.C. Circuit concluded that the EPA's determination of how a margin of safety could be built into the emission standard deserved deference, but struck down the standard in question because it did not build in an any margin of safety.[155]

Applying the logic of *Sierra Club*, the Commission was arguably required to prohibit DINP if even a single person had an HI greater than one and the prohibition would prevent exposure and therefore "provide an adequate margin of safety."[156] Petitioners analogize to cases interpreting the phrase "unreasonable risk" to show that Congress intended the cost of the regulation to be one factor in determining what is necessary to ensure a reasonable certainty of no harm.[157] The Commission considered the meaning of "reasonable certainty of no harm" in its Final Rule and rejected some commenters' suggestion that the phrase meant "reasonably necessary to prevent or reduce an unreasonable risk of injury,"[158] ultimately concluding that the phrase "calls for a highly protective standard, but not 100 percent

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[152] *Id.*

[153] *Id.*

[154] *Id.* at 12.

[155] *Id.* at 13.

[156] *Compare id.* at 12-13, *with* 15 U.S.C. § 2057c(b)(3)(A).

[157] *See Forester v. CPSC*, 559 F.2d 774, 788-89 (D.C. Cir. 1977) (upholding regulations where the cost was slight); *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 844 (5th Cir. 1978) (requiring the commission to consider costs and benefits to determine whether there was "reasonable necessity" for a standard).

[158] Final Rule at 49,944.

certainty of no harm."[159] Attempting to protect the 99th percentile from harm did not exceed the Commission's mandate to "ensure a reasonable certainty of no harm."[160]

However, the Commission ignored the first portion of the standard: it must be "reasonably necessary." We have required regulations to use a cost-benefit analysis based on the word "reasonable."[161] We interpreted the similar phrase "reasonable necessity" to require the Commission to "take a hard look, not only at the nature and severity of the risk, but also the potential the standard has for reducing the severity or frequency of the injury, and the effect the standard would have on the utility, costs or availability of the product."[162] The Supreme Court rejected EPA regulations authorized if the agency found the regulation was "appropriate and necessary" because the EPA did not consider costs to determine whether the regulations were "appropriate."[163] The Court rejected the EPA's arguments that it need not consider costs because Congress used that language only because of its uncertainty about whether the regulation at issue would be needed.[164] The Court noted that "if uncertainty about the need for regulation were the *only* reason [Congress delegated authority to regulate], Congress would have required the Agency to decide only whether the regulation remains 'necessary.'"[165] Accordingly, the Commission was required to at least consider the costs, as well as the effect on utility and availability of products containing DINP to determine whether to continue the interim prohibition to "ensure a reasonable certainty of no harm."[166]

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[159] *Id.*
[160] *Id.* at 49,939.
[161] *Aqua Slide*, 569 F.2d at 844.
[162] *Id.*
[163] *Michigan v. E.P.A.*, 135 S.Ct. 2699, 2708-10 (2015).
[164] *Id.* at 2710.
[165] *Id.*
[166] 15 U.S.C. § 2057c(b)(3)(A).

The Commission expressly "did not prepare a regulatory analysis of the costs and benefits of the rule."[167] It did give some thought to the costs of testing and responded to commenters about the costs of testing on small businesses.[168] That is not enough. Congress required the Commission to consider whether the regulation is "reasonably necessary," and the Commission failed to undertake that analysis. Even under the deferential lens of *Chevron*, the Commission cannot ignore Congress's directive. Accordingly, the Commission procedurally erred by failing to take a hard look at the costs and benefits of continuing Congress's interim prohibition.

2

However, a different standard applied to the Commission's expansion of the DINP prohibition and its prohibition on products containing DIBP, DPENP, DHEXP, and DCHP. Congress required the Commission to "declare any children's product containing any phthalates to be a banned hazardous product . . . as the Commission determines necessary to protect the health of children."[169] Congress did not add a "reasonable" qualifier to the Commission's authority under subsection (B), nor was it required to provide any margin of safety. Accordingly, the Commission was entrusted with discretion to promulgate rules with the singular purpose of "protect[ing] the health of children."[170]

Petitioners argue that the Commission only paid lip service to the statutory standards but failed to apply the standard in its reasoning and decision. Petitioners cite to *Natural Resources Defense Council v. Pritzker* as an analogous case.[171] In that case, the Ninth Circuit invalidated a regulation

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[167] Final Rule at 49,974.
[168] *See id.* at 49,967, 49,970.
[169] 15 U.S.C. § 2057c(b)(3)(B).
[170] *Id.*
[171] 828 F.3d 1125, 1135 (9th Cir. 2016)).

by the National Marine Fisheries Service that it held did not satisfy the enabling legislation's "least practicable adverse impact standard."[172] The agency there stated that it had reviewed the proposed regulation and determined that it would "effect the least practicable adverse impact on marine mammals."[173] The Ninth Circuit held that agency did "not meaningfully discuss how the mitigation measures meet that 'stringent standard.'"[174]

Unlike the agency in *NRDC v. Pritzker*, the Commission here engaged in a thorough analysis of the health risks of phthalates. To start, the Commission reviewed the multi-year findings of the CHAP and discussed them in depth.[175] It then assessed those findings and adopted the Proposed Rule to mirror the recommendations of the CHAP.[176] The Final Rule justified the risks differently by referring to actual women exposed to HIs greater than one, but did give more than mere lip service to the statutory standards.[177] Accordingly, the Commission did not change the standard set by Congress.

Ultimately, the Commission applied the proper health standards to its rulemaking. It applied the "reasonable certainty of no harm" standard to continue its prohibition on DINP, and the "necessary to protect the health of children" to expand its prohibition on DINP and prohibit DIBP, DPENP, DHEXP, and DCHP. However, the Commission did not give an adequate opportunity to comment when it changed its underlying rationale for the final rule. It also erred by failing to consider the cost of continuing the interim prohibition of DINP.

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[172] *NRDC*, 828 F.3d at 1129.
[173] *Id.* at 1135 (quoting 77 Fed Reg. 50,290, 50,294).
[174] *Id.* (citation omitted).
[175] Proposed Rule at 78,326-34; Final Rule at 49,945-50.
[176] Proposed Rule at 78,339.
[177] Final Rule at 49,961.

IV

Petitioners argue that the Commission's Final Rule is arbitrary and capricious. Petitioners specifically mention six decisions. First, the Commission calibrated the HI according to the "most sensitive health effect," which Petitioners argue is not proven to be harmful. Second, the Commission used data that Petitioners deem unreliable. Third, the Commission assumed that humans are more sensitive to phthalates than rodents, which petitioners contend was erroneous. Fourth, the use of spot samples overestimated the actual exposure of individuals. Fifth, adding together the HIs of each individual phthalate resulted in an overestimation of the risk. Sixth, petitioners argue that the link between pre-natal exposure and antiandrogenic effects means that it is unreasonable to ban children's toys, which are certain to be used post-natal.

We are not free to second-guess the Commission's determinations as to statistical methods and scientific data.[178] In reviewing an agency decision, "[o]ur task is to determine whether the agency examined the pertinent evidence, considered the relevant factors, and articulated a 'reasonable explanation for how it reached its decision.'"[179] This standard is highly deferential; we apply a presumption of validity and may not substitute our judgment for that of the agency.[180] The Supreme Court has said that courts should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[181] Having reviewed the record and the Final Rule, we can discern the Commission's path for each of the six decisions above. Its

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[178] *Sw. Elec. Power Co. v. E.P.A.*, 920 F.3d 999, 1019 (5th Cir. 2019).

[179] *Assoc'd Builders and Contractors of Texas v. NLRB*, 826 F.3d 215, 219-20 (5th Cir. 2016) (quoting *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 410 (5th Cir. 1999).

[180] *Id.* (citing *FCC v. Fox Television. Stations, Inc.*, 556 U.S. 502, 513 (2009)).

[181] *Fox Television*, 556 U.S. at 513 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

explanations are not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[182]

V

Having found that the CPSC violated the APA by failing to allow proper notice-and-comment for its new justification and failing to consider the costs of continuing Congress's interim prohibition on DINP, the only remaining question is what remedy is appropriate. Petitioners urge vacatur. We are required to "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[183] However, "[o]nly in 'rare circumstances' is remand for agency reconsideration not the appropriate solution."[184] Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so.[185] In this case, there is a serious possibility that the CSPC will be able to remedy its failures.[186] The Commission must allow industry to comment and consider the new justification for the Final Rule. Further, it must consider the costs of continuing Congress's interim prohibition on DINP to determine whether the rule is "reasonably necessary" to protect from harm.

* * *

Accordingly, we retain jurisdiction and REMAND to the Commission to resolve the defects in its rule.

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[182] *Sw. Elec. Power Co.*, 920 F.3d at 1013 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutu. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotations omitted).

[183] 5 U.S.C. § 706(2).

[184] *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 238-39 (5th Cir. 2007) (citation omitted).

[185] *Central and South West Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000).

[186] *Cf Allied-Signal, Inc. v. N.R.C.*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (explaining that "[a]n inadequately supported rule . . . need not necessarily be vacated").

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
March 1, 2021

Lyle W. Cayce
Clerk

No. 17-60836

TEXAS ASSOCIATION OF MANUFACTURERS; TEXAS CHEMICAL COUNCIL; TEXAS ASSOCIATION OF BUSINESS; NATIONAL ASSOCIATION OF MANUFACTURERS; AMERICAN CHEMISTRY COUNCIL,

Petitioners

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

Respondent

On Petition for Review of an Order of the
Consumer Product Safety Commission

Before OWEN, Chief Judge, and SOUTHWICK and HIGGINSON, Circuit Judges.

PRISCILLA R. OWEN, Chief Judge:

Pursuant to the Consumer Product Safety Improvement Act (CPSIA), the Consumer Product Safety Commission was tasked with studying the effects of phthalates in children's toys and child care articles. The Commission issued a final rule prohibiting the manufacture and sale of any children's toy or child care article that contains concentrations of more than 0.1 percent of any one of five phthalates. Petitioners seek direct review in this court, arguing

that the Commission failed to give an adequate opportunity for comment, failed to apply the proper procedural standards, redefined the substantive standards, and arbitrarily and capriciously applied the scientific data. The Commission moves to dismiss or transfer the case for lack of jurisdiction. We hold that we have jurisdiction to review the rule and that the Commission procedurally erred in promulgating the final rule. In other respects, we affirm, and we remand to the Commission.

I

In 1972, Congress enacted the Consumer Product Safety Act (CPSA)[1] in order to "protect the public against unreasonable risks of injury associated with consumer products."[2] The CPSA established the Consumer Product Safety Commission,[3] which "promulgate[s] consumer product safety standards"[4] and declares when a product is a "banned hazardous product."[5]

In 2008, Congress enacted the Consumer Product Safety Improvement Act (CPSIA),[6] which, among other things, directed the Commission to promulgate rules banning or regulating the use of phthalates in children's toys and child care articles.[7] Phthalates are "a class of organic compounds used primarily" to soften and add flexibility to plastic.[8] Some phthalates have antiandrogenic effects—that is, they affect the male reproductive system and can suppress the production of testosterone and normal development.[9]

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[1] Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (codified as amended at 15 U.S.C. §§ 2051-2089).

[2] 15 U.S.C. § 2051(b).

[3] 15 U.S.C. § 2053.

[4] 15 U.S.C. § 2056.

[5] 15 U.S.C. § 2057.

[6] Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (codified as amended in scattered sections of 15 U.S.C. §§ 2051-2089).

[7] *See, e.g.*, 15 U.S.C. §§ 2056a, 2056b, 2057c.

[8] Prohibition of Children's Toys and Child Care Articles Containing Specified Phthalates, 79 Fed. Reg. 78,324, 78,324 (December 30, 2014) ("Proposed Rule").

[9] Proposed Rule at 78,324; 78,326.

Congress addressed phthalates in three relevant ways. First, the CPSIA made it unlawful to "manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children's toy or child care article that contains concentrations of more than 0.1 percent" of three phthalates: di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), and benzyl butyl phthalate (BBP).[10] Second, the CPSIA included an interim prohibition on "any children's toy that can be placed in a child's mouth or child care article that contains concentrations of more than 0.1 percent" of three other phthalates: diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP).[11] Third, the CPSIA directed the Commission to promulgate a final rule regarding phthalates.[12] By its terms, the interim prohibition remained in place until the Commission promulgated a final rule.[13]

To aid the rulemaking process, Congress directed the Commission to appoint a Chronic Hazard Advisory Panel (CHAP) to "study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles."[14] The CHAP was charged with examining "the full range of phthalates that are used in products for children"[15] and then preparing a report for the Commission with its findings and recommendations.[16] After receiving the CHAP's report, the Commission was directed to:

> (A) determine, based on such report, whether to continue in effect [the interim prohibition], in order to ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals with an adequate margin of safety; and

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[10] 15 U.S.C. § 2057c(a).
[11] *Id.* § 2057c(b)(1).
[12] *Id.* § 2057c(b)(3).
[13] *Id.* § 2057c(b)(1).
[14] *Id.* § 2057c(b)(2)(A).
[15] *Id.* § 2057c(b)(2)(B).
[16] *Id.* § 2057c(b)(2)(C).

> (B) evaluate the findings and recommendations of the [CHAP] and declare any children's product containing any phthalates to be a banned hazardous product under section 8 of the [CPSA], as the Commission determines necessary to protect the health of children.[17]

Pursuant to the CPSIA, the Commission appointed a CHAP,[18] which assessed the risks of phthalates in combination and in isolation.[19] For its cumulative risk assessment, the CHAP employed a hazard index (HI).[20] To determine the HI, the CHAP first calculated the hazard quotient (HQ) for each phthalate by dividing the actual exposure to a particular phthalate by an estimate of the level of exposure that would generally be acceptable.[21] An HQ greater than one might cause "concern for antiandrogenic effects in the exposed population due to the effect of an individual phthalate."[22] Then, the CHAP combined the HQs of the individual phthalates to determine the cumulative HI.[23] The effects of active phthalates are additive in that doses of different phthalates can combine to produce effects.[24] Accordingly, if an individual's cumulative HI is greater than one, "there may be concern for antiandrogenic effects."[25]

To determine the level of exposure that is acceptable or "negligible," the CHAP relied on three case studies examining the effects of phthalates in rodents.[26] Next, the CHAP divided the no-effect level in rodents by ten to

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[17] *Id.* § 2057c(b)(3).

[18] Proposed Rule at 78,325.

[19] Prohibition of Children's Toys and Child Care Articles Containing Specified Phthalates, 82 Fed. Reg. 49,938, 49,957 (Oct. 27, 2017) (codified at 16 C.F.R. § 1307) ("Final Rule").

[20] Proposed Rule at 78,327.

[21] *Id.* at 78,328.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 78,326.

[25] Final Rule at 49,957.

[26] Proposed Rule at 78,326; *see* Final Rule at 49,951.

extrapolate from rodents to humans.[27] Due to the differences in how members of the same species may react to a chemical, the CHAP divided that number by ten again.[28] As a result, the CHAP used a no-effect level for humans that was 100 times lower than that for rodents.

The CHAP used data from three surveys to determine how much exposure humans actually have to phthalates, two involving human-biomonitoring (HBM) and one involving exposure scenario analysis.[29] First, the CHAP used the Department of Heath and Human Services' National Health and Nutrition Examination Survey (NHANES).[30] The NHANES is an HBM survey that measures phthalates and other chemicals in human urine and blood based on spot sampling of pregnant women.[31] For the second study, the CHAP used the Study for Future Families (SFF), an HBM study of mother-child pairs before and after birth by the National Institutes for Health and the Environmental Protection Agency.[32] Finally, the CHAP relied on a scenario-based method to provide information on sources of exposure.[33]

The Commission responded to general comments about its use of HBM data collected via spot sampling, concluding that it could extrapolate average daily exposure based on the spot sampling data.[34] More specifically, the Commission maintained that the spot samples were collected at different sites, at different times of day, and on different days of the week, and participants were selected randomly, and therefore, the data is representative of "estimated

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[27] Final Rule at 49,952.
[28] *Id.*
[29] Proposed Rule at 78,327.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Final Rule at 49,955.

population per capita phthalate exposure across the 2-year NHANES cycle."[35] Spot tests cannot differentiate between sources of phthalates, and most studies conclude that "food, rather than children's toys or child care articles, provides the primary source of exposure."[36] Moreover, phthalates are metabolized quickly and the amount of phthalates detected "depends to a large extent on . . . how long it has been since the last meal."[37] Applying the NHANES and SFF data, the CHAP determined that "up to 10 percent of pregnant women and up to 5 percent of infants" had an HI greater than one.[38]

The CHAP recommended that the Commission lift the interim prohibition on two phthalates—DIDP and DnOP.[39] Those phthalates did not contribute to the HI.[40] However, the CHAP recommended that the Commission (1) issue a permanent prohibition for DINP at levels greater than 0.1 percent in all children's toys and child care articles, not just toys that can be placed in a child's mouth;[41] and (2) issue a permanent prohibition on children's toys and child care articles containing diisobutyl phthalate (DIBP), di-n-pentyl phthalate (DPENP), di-n-hexyl phthalate (DHEXP), and dicyclohexyl phthalate (DCHP) at levels greater than 0.1 percent.[42] DIBP, DPENP, DHEXP, and DCHP were not prohibited by the CPSIA, but the CHAP

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[35] *Id.*

[36] Proposed Rule at 78,327.

[37] Minutes of Commission Meeting Re: Final Phthalates Rules, Index No. 462 (Oct. 18, 2017) (Statement of Comm'r A. Buerkle), https://www.cpsc.gov/s3fs-public/ACHBuerklesPhthalatesfinalrulestatement10302017.pdf?1N0bigFnYyn_CGtgCEGQZJrjTnsjv3RO; see also CHAP at 75, https://www.cpsc.gov/s3fs-public/CHAP-REPORT-With-Appendices.pdf.

[38] Proposed Rule at 78,328.

[39] *Id.* at 78,329-30.

[40] *See id.*

[41] *Id.* at 78,329.

[42] *Id.* at 78,330.

concluded that "they contribute to the cumulative risk" and should be prohibited permanently.[43]

The Commission issued a proposed rule (Proposed Rule) that implemented the CHAP's recommendations.[44] In explaining its rationale for the Proposed Rule, the Commission agreed with the CHAP that "the acceptable risk is exceeded when the HI is greater than one."[45] Accordingly, the Commission decided that an HI less than one "is necessary 'to ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals with an adequate margin of safety.'"[46] The Commission found it particularly pertinent that the HI was greater than one for ten percent of pregnant women, and the HI at the 95th percentile was five.[47]

After publication of the Proposed Rule, the NHANES released updated data sets.[48] Using the new data, the Commission had its staff "replicate the CHAP's methodology."[49] However, unlike the CHAP, which studied pregnant women, the staff "used women of reproductive age" (WORA) due to a lack of data on pregnant women.[50] The staff found that the risk decreased with the updated data.[51] The HI at the 95th percentile was now less than one.[52] The staff estimated that, using the updated data, between 98.8 and 99.6 percent of WORA had HIs less than or equal to one.[53] The staff was "unable to estimate

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[43] *Id.* It also appears that DPENP, DHEXP, and DCHP were not included in the HI metric. *Id.* at 78,328 (Table 1 "summarized" the CHAP's findings and did not include those phthalates.).

[44] *Id.* at 78,343.

[45] *Id.* at 78,334.

[46] *Id.*

[47] *See, e.g.*, *id.* at 78,328, 78,332-33.

[48] Final Rule at 49,939.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 49,958.

[52] *Id.*

[53] *Id.*; *see also id.* at 49,963 ("CPSC staff determined that approximately 99 percent of WORA in the U.S. population now have an HI less than or equal to one.").

the percentage of WORA with an HI greater than one,"[54] but noted that "between two and nine real women from the sample of 538 WORAs had an HI greater than one."[55]

The Commission concluded that "phthalate exposures and risks in WORA probably underestimate the risks to infants and children" because "infants' exposures generally are two- to threefold greater than adults."[56] The Commission also noted that exposure to DINP increased "approximately five-fold" since the CHAP's report, despite the decrease in exposure to phthalates on the whole.[57] Based on the new data, the Commission, by a 3-2 vote,[58] promulgated a final rule (Final Rule) substantively identical to the Proposed Rule.[59] The Final Rule prohibits "the manufacture for sale, offer for sale, distribution in commerce, or importation into the United States of any children's toy or child care article that contains concentrations of more than 0.1 percent of [DINP], [DIBP], [DPENP], [DHEXP], and [DCHP]."[60] To summarize, the Final Rule (1) makes the CPSIA's interim prohibition on DINP permanent, (2) extends the scope of the CPSIA's interim prohibition on DINP to "any children's toy or child care article," and (3) prohibits four phthalates not prohibited by the CPSIA: DIBP, DPENP, DHEXP, and DCHP.[61]

Petitioners, trade associations representing chemical manufacturers, now seek direct review in this court. Natural Resources Defense Council, Inc., Environmental Justice Health Alliance for Chemical Policy Reform, and

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[54] *Id.* at 49,958.
[55] *Id.* at 49,961.
[56] *Id.* at 49,958.
[57] *Id.* at 49,963.
[58] *Id.* at 49,938 n.1.
[59] *Id.* at 49,982.
[60] *Id.*
[61] *Compare id., with* 15 U.S.C. § 2057c(b)(1).

Breast Cancer Prevention Partners (Intervenors) intervened in support of the Final Rule.

II

As a threshold matter, we address two challenges to our jurisdiction. Intervenors assert that the Petitioners lack standing to pursue these claims. The Commission also moved to dismiss this action, arguing that we lack jurisdiction because the Final Rule is not a "consumer product safety rule," and we therefore lack statutory authorization for direct review.

A

Petitioners bear the burden of showing they have standing for each type of relief sought.[62] To establish standing to seek injunctive relief, the plaintiff must show

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[63]

Petitioners are five trade associations that seek to establish standing using a theory of associational standing. Associations may assert the standing of their own members.[64] "An association has standing to bring a suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[65] The only issue in this case is whether

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[62] *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

[63] *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

[64] *Summers*, 555 U.S. at 494.

[65] *Friends of the Earth*, 528 U.S. at 181.

any member of the Petitioner associations has standing to bring the claim in its own right.

According to Intervenors, Petitioners have not established that "at least one identified member ha[s] suffered or would suffer harm" from the Final Rule. In response, Petitioners attached to their Reply Brief an additional affidavit by Christopher Wallace, an employee of ExxonMobil Chemical Company (EMCC). EMCC is a member of Texas Chemical Council (TCC), one of the Petitioners. Even without the additional affidavit, the record demonstrates that EMCC is a producer of DINP. It is less clear, however, whether EMCC manufactures DINP for the use in products that will become children's toys or child care articles. The record does not contain any indication that EMCC's products are used or have been used in children's toys or child care articles. The injury need not be actualized; a threatened injury suffices if it is "real, immediate, and direct."[66] A high risk of economic injury is sufficiently real, immediate, and direct.[67] The Supreme Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions.[68] While the issue is a close one, we are satisfied that the threat of reduced sales to companies that manufacture children's toys and child care articles is sufficiently concrete that EMCC, and by proxy TCC, has standing to challenge the Final Rule as it relates to DINP.

Petitioners further argue that they have standing because of the "stigma" inflicted by the Final Rule. According to one affidavit, in response to pressure from groups citing the Commission's rulemaking process, major flooring retailers announced they would no longer carry flooring tile that

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[66] *Davis v. Federal Election Com'n*, 554 U.S. 724, 734 (citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

[67] *Pac. Gas & Elec. Co. v. FERC*, 106 F.3d 1190, 1195 (5th Cir. 1997).

[68] *Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (quoting 3 K. Davis & R. Pierce, Administrative Law Treatise 13-14 (3d ed. 1994)).

contains phthalates. EMCC experienced losses in its flooring market revenue that it attributes to the Final Rule. Petitioners argue that we should apply the same standards as the D.C. Circuit when assessing whether these facts support standing.[69] In *Tozzi*, the Department of Health and Human Services published a revised list of substances known or reasonably anticipated to cause cancer and upgraded the chemical "dioxin" from "reasonably anticipated" to "known."[70] The petitioner, a manufacturer of medical devices that emit dioxin when incinerated, sued to vacate the rule.[71] The D.C. Circuit held that the petitioner had standing because the agency's action was a "substantial factor" in the decisions of purchasers to reduce or end purchases of PVC plastics contained in the petitioner's devices.[72] Further, the court noted that "[w]hen the government attaches an inherently pejorative and damaging term such as 'carcinogen' to a product, the probability of economic harm increases exponentially."[73]

According to Petitioners, CPSC's decision to prohibit certain phthalates from children's toys and child care articles is likewise a "substantial factor" in causing EMCC's economic injury. We agree. EMCC's evidence of lost sales sufficiently demonstrates an injury in fact traceable to the Final Rule. Accordingly, TCC has demonstrated that it has standing to challenge the Final Rule as it relates to DINP. Even though the other petitioners have not named members that manufacture the prohibited phthalates, the presence of one petitioner with standing is sufficient for Article III purposes.[74]

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[69] *See Tozzi v. United States Dep't of Health and Human Servs.*, 271 F.3d 301 (2001).
[70] *Id.* at 303.
[71] *Id.* at 306-08.
[72] *Id.* at 309.
[73] *Id.*
[74] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

However, standing is not dispensed in gross; plaintiffs must demonstrate standing "for each claim [t]he[y] seek[] to press" and "for each form of relief that is sought."[75] Defining a "claim" in this context is somewhat elusive.[76] For example, the Supreme Court in *Blum v. Yaretsky* held that plaintiffs had standing to challenge one aspect of the Medicaid Act but not others.[77] In *Blum*, nursing home patients brought suit after the state of New York determined that they no longer needed the care they were receiving and should be transferred to a lower level of care.[78] The Court agreed that the patients had standing to challenge the decision to transfer them to a lower level of care but held that they could not challenge the procedures for transferring patients to higher levels of care because "[n]othing in the record . . . suggest[ed] that any of the individual respondents [had] been" transferred to higher care, and "assessing the possibility now would 'tak[e] [the Court] into the area of speculation and conjecture.'"[79]

On the other hand, in *Davis v. Federal Election Commission*, a candidate had standing to challenge both the asymmetrical contribution limitations under § 319(a) of the Bipartisan Campaign Reform Act of 2002[80] and the disclosure requirements under § 319(b) when the record indicated that the limits likely would have applied to the candidate.[81] Section 319 created rules

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[75] *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008) (internal quotation marks omitted) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

[76] *See* 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRACTICE & PROC.§ 3531.16 Scope Of Standing, (3d ed.) ("It is easy enough to agree that a challenge to a state tax abatement is a claim separate from a challenge to a municipal tax abatement. Equally easy distinctions will be drawn in other cases. But still other cases will present difficult line-drawing challenges.").

[77] 457 U.S. 991 (1982).

[78] *Id.* at 995.

[79] *Id.* at 1001 (third alteration in original) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

[80] 116 Stat. 109 (codified at 52 U.S.C. § 30117).

[81] *Davis*, 554 U.S. at 733-35.

that applied to self-funding candidates contributing more than $350,000 of their own funds to the campaign.[82] The candidate intended to contribute more than $350,000 and made the disclosures required by subsection (b), giving him standing to challenge that provision.[83] The Federal Election Commission argued that the candidate did not have standing to challenge the asymmetrical contribution limits because they did not apply at the outset of the suit or at any point in time during the race at issue.[84] The Court held that there was a sufficient probability that the asymmetrical contribution limits would apply, and accordingly the candidate could challenge both provisions.[85]

The Ninth Circuit has held that an Americans with Disabilities Act plaintiff who was impeded by obstacles at one store could challenge all the obstacles to his mobility at that store, even the ones he was not aware of at the time he brought the suit.[86] That decision relied partially on the Supreme Court's instructions that courts take a "broad view of constitutional standing in civil rights cases," but the decision focused on whether the plaintiff had a sufficient personal stake "as to assure that concrete adverseness which sharpens the presentation of issues" upon which the court must rule.[87]

In an analogous case, the D.C. Circuit held that plaintiffs had standing to challenge every aspect of a Bureau of Land Management (BLM) decision that aggrieved them.[88] In *WildEarth Guardians*, an environmental group challenged the BLM's decision to issue a lease to mine federal lands in Wyoming, arguing that the mine would injure their aesthetic and recreational

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[82] 52 U.S.C. § 30117(a)(1).
[83] *Davis*, 554 U.S. at 733.
[84] *Id.* at 734.
[85] *Id.* at 734-35.
[86] *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1041-44 (9th Cir. 2008).
[87] *Id.* at 1043 (citations omitted).
[88] *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013)

interests.[89] Plaintiffs claimed a procedural injury, alleging that the Environmental Impact Statement (EIS) was deficient in its consideration of local pollution and global greenhouse gas emissions.[90] The district court and the D.C. Circuit agreed that plaintiffs had standing to challenge the EIS with respect to local pollution because "the local pollution that causes their members' aesthetic and recreational injuries follows inexorably from the decision to authorise leasing" on the tract.[91] The district court held that the organization did not have standing to challenge the global greenhouse emissions because those emissions did not affect the aesthetic and recreational interests; the circuit court disagreed.[92] According to the D.C. Circuit, the plaintiffs could challenge any alleged deficiencies in the EIS because their injuries were "caused by the allegedly unlawful [lease] and would be redressed by vacatur of the [lease] on the basis of any of the procedural defects identified in the [EIS].[93]

Applying these principles, EMCC has standing to bring its challenge to the Final Rule. The possibility of reduced sales of DINP along with the stigmatic effect of the rule provides standing to pursue its claim. Those injuries were caused by an allegedly unlawful rule and would be redressed by vacatur of the rule on the basis of any of the grounds raised. Further, the claim that CPSC violated various procedural requirements, if successful, would require us to grant relief that would apply to the entirety of the Final Rule, as the portions of the Final Rule pertaining to each individual phthalate are the result of the same administrative decision-making process.

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[89] *Id.* at 302.
[90] *Id.* at 305-06.
[91] *Id.* at 306.
[92] *Id.* at 306-07.
[93] *Id.* at 308.

B

Federal courts of appeals are courts "of limited subject matter jurisdiction . . . authorized to review decisions and orders of administrative agencies only as provided by acts of Congress."[94] Section 2060(a) of the CPSA provides that "[n]ot later than 60 days after a consumer product safety rule is promulgated by the Commission," a person may file a petition for "judicial review of such rule" in the court of appeals.[95] The parties contest whether the Final Rule is a "consumer product safety rule" subject to the § 2060(a)'s procedure for judicial review.

Section 2052(a)(6) of the CPSA defines a "consumer product safety rule" as "a consumer products safety standard described in section 2056(a) of this title, or a rule under this chapter declaring a consumer product a banned hazardous product."[96] In its phthalate provisions, the CPSIA provides that "any rule promulgated under [§ 2057c](b)(3) shall be considered consumer product safety standards under the [CPSA]."[97] The Final Rule was promulgated under § 2057c(b)(3),[98] so, pursuant to the CPSIA, it is a consumer product safety standard under the CPSA.[99] As a consumer product safety standard, the Final Rule is a consumer product safety rule as defined in § 2052(a)(6). The Final Rule is consequently subject to the procedures for judicial review established by § 2060(a).[100] We have jurisdiction to review the Final Rule.

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[94] *Xavier Univ. v. Nat'l Telecomms.*, 658 F.2d 306, 307 (5th Cir. Unit A 1981) (citations omitted).

[95] 15 U.S.C. § 2060(a).

[96] 15 U.S.C. § 2052(a)(6).

[97] 15 U.S.C. § 2057c(f).

[98] Final Rule at 49,940.

[99] *See* 15 U.S.C. § 2057c(f).

[100] 15 U.S.C. § 2060(a).

Each of the Commission's arguments to the contrary is unavailing. First, the Commission argues that the Final Rule is not a consumer product safety standard *described in section 2056(a).* That argument ignores that the Final Rule is statutorily defined to be a consumer product safety rule. The Commission's other main argument is that Congress only intended phthalate rules to be consumer product safety rules for purposes of preemption. The subsection of the CPSIA at issue is titled "Treatment as consumer product safety standards; effect on State laws."[101] The subsection's first sentence provides that "any rule[s] promulgated under subsection (b)(3)," including the Final Rule, "shall be considered consumer product safety standards."[102] The second sentence states that "[n]othing in this section or the [CPSA] shall be construed to preempt or otherwise affect any State requirement with respect to any phthalate alternative not specifically regulated in a consumer product safety standard under the [CPSA]."[103] Congress clearly contemplated that it was both defining phthalate rules as consumer product safety standards *and* expressing the scope of preemption. The Commission's argument to the contrary is without merit. Further, the Commission considers the Final Rule to be a consumer product safety standard for purposes of testing and certification requirements under the CPSA.[104] The Commission cannot have its cake and prevent our review by relying on the same provision. The Final Rule is defined by Congress as a consumer product safety standard, and we have jurisdiction to review it.

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[101] 15 U.S.C. § 2057c(f).

[102] *Id.*

[103] *Id.*

[104] See 82 Fed Reg 49,767, 49,768 ("The Commission's phthalates rule is considered a 'consumer product safety standard.' 15 U.S.C. 2063c(f).") The Commission cited to 2063c(f) for this proposition but that statute does not exist. Presumably, the Commission meant to cite to § 2057c(f), which defines the phthalate rule as a consumer product safety standard.

III

Petitioners ask the court to set aside the Final Rule because, in their view, the Commission failed to give an adequate opportunity to comment on the rulemaking, failed to apply the proper procedural standards, redefined the substantive standards, and arbitrarily and capriciously applied the scientific data. We address each in turn and hold that the Commission procedurally erred by not providing an adequate opportunity to comment on the rule and by failing to consider the costs of a portion of the rule.

A

Petitioners argue that the Commission did not provide an adequate opportunity to comment on its use of data at the 99th percentile to justify its prohibition. The APA requires agencies to publish a notice of proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[105] Final rules under APA notice-and-comment rulemaking must be the "logical outgrowth" of the proposed rule.[106] The objective is fair notice.[107] "If interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period, then the rule is deemed to constitute a logical outgrowth of the proposed rule."[108]

Petitioners do not object to a substantive change in the text of the Proposed Rule and the Final Rule, but to the change in the justification for the

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[105] 5 U.S.C. § 553(b)(3).

[106] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (citations omitted); *see also ConocoPhilips Co. v. EPA*, 612 F.3d 822, 834 (5th Cir. 2010) (citation omitted).

[107] *Long Island*, 551 U.S. at 174.

[108] *American Coke & Coal Chemicals Inst. v. EPA*, 452 F.3d 930, 938-39 (D.C. Cir. 2006) (citing *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).

Proposed Rule and the justification for the Final Rule. The Commission's primary justification for the Proposed Rule was data demonstrating that ten percent of pregnant women had an HI greater than one, which exceeded the acceptable risk, and that the average HI was five at the 95th percentile.[109] However, when the Commission examined the updated data released after the publication of the Proposed Rule, it found that the risk of antiandrogenic effects had decreased, and that the HI at the 95th percentile had decreased from five to less than one.[110] The Commission could not determine exactly what percentage of the women studied had an HI greater than one,[111] but did state that "between two and nine real women from the sample of 538 WORAs had an HI greater than one."[112] The Commission relied on this new data when promulgating the Final Rule.[113]

According to Petitioners, the Commission did not provide fair notice when it changed its justification for the prohibition from data showing that the average HI was greater than one in the 95th percentile to data including individual spot samples with HIs greater than one.[114] We agree. The Commission's justification for the Proposed Rule was based on data showing that a statistically stable percentage of the women studied had an HI that indicated an unacceptably high risk of antiandrogenic effects. After new data became available, the Commission replicated the CHAP's methodology and determined that there were too few samples with an HI above one to estimate the number of women and children in the general population who are

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[109] Proposed Rule at 78,328, 78,334.
[110] Final Rule at 49,958.
[111] *Id.*
[112] *Id.* at 49,961.
[113] *Id.*
[114] *Compare* Proposed Rule at 78,328, *with* Final Rule at 49,961.

negatively affected by the phthalates at issue.[115] Because the Commission could no longer justify the rule based on the ten percent of women who had risky exposures, it justified the Final Rule because between two and nine individual samples had HIs deemed unacceptable.

The Commission provided some notice that it was relying on new data and asked for comments.[116] One commenter objected to the use of spot checks at the 99th percentile, and the Commission responded to that comment.[117] The Commission argues that the public was therefore aware that it was "considering the matter," and the Commission provided sufficient notice under the APA.[118] We disagree. The agency's rationale for the rule must be made clear and subjected to public comment.[119] In the notices to which the Commission refers, statements about statistically unstable data dominate, and any reference to spot samples is not clearly communicated as a new justification to support the rule and supplant the unstable statistical analysis.[120] Thus, while the Commission did provide some opportunity for comment on its reliance on spot samples, it did not make clear it was inviting comments on the use of spot samples as a new justification for why the Final Rule is necessary to protect the health of children. The fact that one commenter suggested that data above the 95th percentile is too unstable for rulemaking does not relieve the Commission of its burden to provide notice and

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[115] *See* 80 Fed. Reg. 35,938 (June 23, 2015); 82 Fed. Reg. 11,348 (Feb. 22, 2017).
[116] *See* 80 Fed. Reg. 35,938; 82 Fed. Reg. 11,348.
[117] Final Rule at 49,961.
[118] *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007).
[119] *See Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1212 (5th Cir. 1991).
[120] *See* 80 Fed. Reg. 35,938; 82 Fed. Reg. 11,348.

an opportunity to comment on the clearly articulated justification for its use of such data.[121]

Because it was justified with reference to individual spot samples rather than an estimable percentage of the population that had potentially harmful exposure to the phthalates in question, the Final Rule is not a logical outgrowth of the Proposed Rule. As one of the commissioners pointed out, that change in methodology—whether right or wrong—was not reasonably foreseeable based on the Proposed Rule.[122] Accordingly, the Commission violated the APA's notice-and-comment procedures by not adequately allowing for comment after it changed its primary justification for the rule but before adopting a final rule.

B

Petitioners argue that the Final Rule declares five phthalates to be "banned hazardous products" under § 2057c and consequently should have complied with § 2057's requirements for such a ban. This argument is premised on § 2057c(b)(3)(B), which empowers the Commission to "declare any children's product containing any phthalates to be a banned hazardous product under Section 8 of the Consumer Product Safety Act (15 U.S.C. 2057)."[123] We review the Commission's actions under the familiar framework of *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*[124]

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[121] *See Fertilizer Inst. V. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) ("The fact that some commenters actually submitted comments suggesting the creation of administrative exemptions is of little significance.").

[122] Minutes of Commission Meeting Re: Final Phthalates Rules, Index No. 462, at 23 (Oct. 18, 2017) (Statement of Comm'r J. Mohorovic).

[123] 15 U.S.C. § 2057c(b)(3)(B).

[124] *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Michigan v. E.P.A.*, 135 S.Ct. 2699, 2707 ("*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers.").

The Commission may ban a consumer product under § 2057 when it finds that the product presents an unreasonable risk of injury and "no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product."[125] Section 2057 in turn requires the Commission to comply with § 2058 when declaring products "banned hazardous products."[126] The Commission indisputably did not comply with § 2058, which requires, among other things, findings as to: (1) "the degree and nature of the risk of injury," (2) the approximate number of products subject to the rule, and (3) "any means of achieving the objective of the order while minimizing adverse effects on competition."[127]

The Commission argues that it was not required to comply with § 2058 because it was authorized to promulgate the Final Rule by the CPSIA, which contains its own detailed requirements for rulemaking in § 2057c(b)(3). Section 2057c(b)(3) directs that "the Commission shall, pursuant to section 553 of Title 5, promulgate a final rule."[128] Section 553 of Title 5 sets forth the general notice-and-comment rulemaking process under Administrative Procedures Act (APA).[129] In addition, § 2057c(b)(3)(B) directs the Commission to "evaluate the findings and recommendations of the [CHAP]" and ban products containing phthalates "as the Commission determines necessary to protect the health of children."[130] According to the Commission, the specific

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[125] 15 U.S.C. § 2057.
[126] *Id.*
[127] 15 U.S.C. § 2058.
[128] 15 U.S.C. § 2057c(b)(3).
[129] *See* 5 U.S.C. § 553.
[130] 15 U.S.C. § 2057c(b)(3).

controls over the general,[131] and the specific requirements contained in § 2057c(b)(3) are incompatible with the requirements imposed by § 2058. Further, the Commission argues that if there is ambiguity, its interpretation is entitled to *Chevron* deference.

The Commission's reading of § 2057c is correct. Rather than direct the Commission to follow its general rulemaking procedures, § 2057c(b)(3) authorizes rulemaking under the APA's notice-and-comment procedures. The standard for promulgating rules is also different—whereas § 2058 requires the Commission to find that a product poses "an unreasonable risk of injury" before promulgating a rule,[132] § 2057c(b)(3)(B) requires the Commission to promulgate a phthalate rule on a finding that the rule is "necessary to protect the health of children."[133] Further, § 2057c(b)(3)(A) empowers the Commission to promulgate a rule continuing Congress's interim prohibition "to ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals with an adequate margin of safety."[134] While there may be substantial overlap in the standards imposed by § 2057c(b)(3) and § 2058, Congress phrased the standards differently, indicating that Congress intended the standards in § 2057c(b)(3) to apply instead of the standards laid out in § 2058. The Commission did not procedurally err in promulgating the Final Rule pursuant to § 2057c(b)(3).

C

Alternatively, Petitioners argue that the Commission ignored statutory standards for rulemaking and instead promulgated rules to provide "absolute

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[131] *See United States v. Marshall*, 798 F.3d 296, 318 (5th Cir. 2015) ("[I]t is familiar law that a specific statute controls over a general one.") (internal quotation marks omitted) (quoting *Bulova Watch. Co. v. United States*, 365 U.S. 753, 758 (1961)).

[132] 15 U.S.C. § 2058.

[133] 15 U.S.C. § 2057c(b)(3)(B).

[134] *Id.* § 2057c(b)(3)(A).

certainty of no risk." Subsection (A) empowers the Commission to continue the interim prohibition on DINP "to ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals with an adequate margin of safety."[135] Subsection (B) of § 2057c(b)(3) empowers the Commission to ban children's products containing phthalates as "necessary to protect the health of children."[136] According to Petitioners, the Commission misread these two separate standards together as a mandate to "demand an absolute certainty of no risk."

In its description of the rationale behind the Final Rule, the Commission cited the standards in § 2057c(b)(3)(A) and (B).[137] In promulgating the specific prohibitions, it referred to the standards applicable to its decision on each phthalate. The Commission continued the prohibition on DINP because the prohibition is "still necessary to 'ensure a reasonable certainty of no harm' to children and pregnant women with an 'adequate margin of safety.'"[138] The Commission also extended the prohibition to all "children's toy and child care articles," not just those "that can be placed in a child's mouth," because it found that such a rule was necessary both "to ensure a reasonable certainty of no harm and to protect the health of children."[139] When the Commission determined that it was not necessary to continue the interim prohibition on DNOP and DIDP, it properly employed the "reasonable certainty of no harm" standard.[140] Finally, the Commission referred to the "necessary to protect the

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[135] *Id.*

[136] *Id.* § 2057c(b)(3)(B).

[137] Final Rule at 49,938; 49,957 ("to meet the CPSIA's criteria of reasonable certainty of no harm and protection of the health of children, it is necessary to prohibit children's toys and child care articles containing concentrations of more than 0.1 percent of . . . DINP, DIBP, DPENP, DHEXP, and DCHP").

[138] *Id.* at 49,966.

[139] *Compare id.* at 49,966-67, *with* 15 U.S.C. § 2057c(b)(1).

[140] Final Rule at 49,968.

health of children" standard when it finalized its ban on DIBP, DPENP, DHEXP, and DCHP.[141]

1

Petitioners contend that the Commission exceeded its mandate to protect against "harm" and instead issued a Final Rule that protected against "risk." Risk is "the chance of injury, damage, or loss."[142] Harm, on the other hand, is actual "[i]njury, loss, damage[,] [or] material or tangible detriment."[143] According to Petitioners, the Commission overprotected consumers by prohibiting products with phthalates based on evidence of risk, not harm.

We disagree. Adopting the standard used in the CHAP report, the Commission interpreted the phrase "necessary to protect the health of children" to require "an HI less than or equal to one."[144] The Proposed Rule explained:

> If the HI is greater than one, there may be a concern for antiandrogenic effects in the exposed population due to the cumulative effects of phthalates. . . . Having a HI greater than one does not necessarily mean that adverse effects will occur; however, this possibility cannot be ruled out.[145]

Accordingly, the Commission determined that preventing exposure to an HI greater than one was necessary to ensure that adverse effects—i.e., harm—will not occur. The HI method itself is not controversial, though Petitioners argue that the Commission was overly conservative in setting the benchmark.

Petitioners also argue that Congress required only "reasonable certainty," not "absolute certainty." In Petitioners' view, the Commission

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[141] *Id.* at 49,969-70.

[142] *Risk,* BLACK'S LAW DICTIONARY (10th Ed. 2014)*; see Risk*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th Ed. 2009) (defining "risk" as "the possibility of loss or injury").

[143] *Harm*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[144] Final Rule at 49,968.

[145] Proposed Rule at 78,328 & n.8.

exceeded this mandate when it (a) considered risks at or above the 99th percentile of spot samples, and (b) did not consider costs of the regulation to determine whether the regulation could prevent harm "with reasonable certainty."

Both parties agree that statistical data above the 99th percentile is not stable, i.e., is not reliable.[146] Petitioners argue that the Commission initially relied on scientifically valid 95th-percentile data and then moved the goalposts when there was not significant risk at that level.[147] The Commission responded to this argument in its Final Rule, asserting that the instability at the 99th percentile "mean[s] that [the Commission is] precluded from estimating the precise number of WORA with HIs greater than one in the larger population from which the sample was selected."[148] Instead, the Commission urges that the rule is "not based on any particular percentile, but on the observation that actual women from the NHANES sample have HIs greater than one."[149]

In the abstract, protecting the 99th percentile from harm is not per se unreasonable and may be required by subsection (A). The Commission is required to continue the interim prohibition on DINP to "ensure a reasonable certainty of no harm . . . with an adequate margin of safety."[150] The District of Columbia Circuit recently examined the meaning of a comparable requirement to provide an "ample margin of safety" in *Sierra Club v. EPA*.[151] The EPA had been authorized to set a health threshold for acid gases that included an

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[146] *See* Final Rule at 49,961.
[147] *See* Proposed Rule at 78,328, 78,332-33.
[148] Final Rule at 49,961.
[149] *Id.*
[150] 15 U.S.C. § 2057c(b)(3)(A).
[151] 895 F.3d 1, 12-13 (D.C. Cir. 2018).

"ample margin of safety."[152] The EPA employed a model based on conservative assumptions, including worst-case weather and worst-case population proximity, and set a standard that resulted in most of the country having a hazard quotient of below one (the level at which there was a risk to human health).[153] However, in the model, the EPA projected that some people would be exposed to the regulated gases if both worst-case scenarios came to pass.[154] The D.C. Circuit concluded that the EPA's determination of how a margin of safety could be built into the emission standard deserved deference, but struck down the standard in question because it did not build in an any margin of safety.[155]

Applying the logic of *Sierra Club*, the Commission was arguably required to prohibit DINP if even a single person had an HI greater than one and the prohibition would prevent exposure and therefore "provide an adequate margin of safety."[156] Petitioners analogize to cases interpreting the phrase "unreasonable risk" to show that Congress intended the cost of the regulation to be one factor in determining what is necessary to ensure a reasonable certainty of no harm.[157] The Commission considered the meaning of "reasonable certainty of no harm" in its Final Rule and rejected some commenters' suggestion that the phrase meant "reasonably necessary to prevent or reduce an unreasonable risk of injury,"[158] ultimately concluding that the phrase "calls for a highly protective standard, but not 100 percent

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[152] *Id.*

[153] *Id.*

[154] *Id.* at 12.

[155] *Id.* at 13.

[156] *Compare id.* at 12-13, *with* 15 U.S.C. § 2057c(b)(3)(A).

[157] *See Forester v. CPSC*, 559 F.2d 774, 788-89 (D.C. Cir. 1977) (upholding regulations where the cost was slight); *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 844 (5th Cir. 1978) (requiring the commission to consider costs and benefits to determine whether there was "reasonable necessity" for a standard).

[158] Final Rule at 49,944.

certainty of no harm."[159] Attempting to protect the 99th percentile from harm did not exceed the Commission's mandate to "ensure a reasonable certainty of no harm."[160]

However, the Commission ignored the first portion of the standard: it must be "reasonably necessary." We have required regulations to use a cost-benefit analysis based on the word "reasonable."[161] We interpreted the similar phrase "reasonable necessity" to require the Commission to "take a hard look, not only at the nature and severity of the risk, but also the potential the standard has for reducing the severity or frequency of the injury, and the effect the standard would have on the utility, costs or availability of the product."[162] The Supreme Court rejected EPA regulations authorized if the agency found the regulation was "appropriate and necessary" because the EPA did not consider costs to determine whether the regulations were "appropriate."[163] The Court rejected the EPA's arguments that it need not consider costs because Congress used that language only because of its uncertainty about whether the regulation at issue would be needed.[164] The Court noted that "if uncertainty about the need for regulation were the *only* reason [Congress delegated authority to regulate], Congress would have required the Agency to decide only whether the regulation remains 'necessary.'"[165] Accordingly, the Commission was required to at least consider the costs, as well as the effect on utility and availability of products containing DINP to determine whether to continue the interim prohibition to "ensure a reasonable certainty of no harm."[166]

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[159] *Id.*
[160] *Id.* at 49,939.
[161] *Aqua Slide*, 569 F.2d at 844.
[162] *Id.*
[163] *Michigan v. E.P.A.*, 135 S.Ct. 2699, 2708-10 (2015).
[164] *Id.* at 2710.
[165] *Id.*
[166] 15 U.S.C. § 2057c(b)(3)(A).

The Commission expressly "did not prepare a regulatory analysis of the costs and benefits of the rule."[167] It did give some thought to the costs of testing and responded to commenters about the costs of testing on small businesses.[168] That is not enough. Congress required the Commission to consider whether the regulation is "reasonably necessary," and the Commission failed to undertake that analysis. Even under the deferential lens of *Chevron*, the Commission cannot ignore Congress's directive. Accordingly, the Commission procedurally erred by failing to take a hard look at the costs and benefits of continuing Congress's interim prohibition.

2

However, a different standard applied to the Commission's expansion of the DINP prohibition and its prohibition on products containing DIBP, DPENP, DHEXP, and DCHP. Congress required the Commission to "declare any children's product containing any phthalates to be a banned hazardous product . . . as the Commission determines necessary to protect the health of children."[169] Congress did not add a "reasonable" qualifier to the Commission's authority under subsection (B), nor was it required to provide any margin of safety. Accordingly, the Commission was entrusted with discretion to promulgate rules with the singular purpose of "protect[ing] the health of children."[170]

Petitioners argue that the Commission only paid lip service to the statutory standards but failed to apply the standard in its reasoning and decision. Petitioners cite to *Natural Resources Defense Council v. Pritzker* as an analogous case.[171] In that case, the Ninth Circuit invalidated a regulation

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[167] Final Rule at 49,974.
[168] *See id.* at 49,967, 49,970.
[169] 15 U.S.C. § 2057c(b)(3)(B).
[170] *Id.*
[171] 828 F.3d 1125, 1135 (9th Cir. 2016)).

by the National Marine Fisheries Service that it held did not satisfy the enabling legislation's "least practicable adverse impact standard."[172] The agency there stated that it had reviewed the proposed regulation and determined that it would "effect the least practicable adverse impact on marine mammals."[173] The Ninth Circuit held that agency did "not meaningfully discuss how the mitigation measures meet that 'stringent standard.'"[174]

Unlike the agency in *NRDC v. Pritzker*, the Commission here engaged in a thorough analysis of the health risks of phthalates. To start, the Commission reviewed the multi-year findings of the CHAP and discussed them in depth.[175] It then assessed those findings and adopted the Proposed Rule to mirror the recommendations of the CHAP.[176] The Final Rule justified the risks differently by referring to actual women exposed to HIs greater than one, but did give more than mere lip service to the statutory standards.[177] Accordingly, the Commission did not change the standard set by Congress.

Ultimately, the Commission applied the proper health standards to its rulemaking. It applied the "reasonable certainty of no harm" standard to continue its prohibition on DINP, and the "necessary to protect the health of children" to expand its prohibition on DINP and prohibit DIBP, DPENP, DHEXP, and DCHP. However, the Commission did not give an adequate opportunity to comment when it changed its underlying rationale for the final rule. It also erred by failing to consider the cost of continuing the interim prohibition of DINP.

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[172] *NRDC*, 828 F.3d at 1129.
[173] *Id.* at 1135 (quoting 77 Fed Reg. 50,290, 50,294).
[174] *Id.* (citation omitted).
[175] Proposed Rule at 78,326-34; Final Rule at 49,945-50.
[176] Proposed Rule at 78,339.
[177] Final Rule at 49,961.

IV

Petitioners argue that the Commission's Final Rule is arbitrary and capricious. Petitioners specifically mention six decisions. First, the Commission calibrated the HI according to the "most sensitive health effect," which Petitioners argue is not proven to be harmful. Second, the Commission used data that Petitioners deem unreliable. Third, the Commission assumed that humans are more sensitive to phthalates than rodents, which petitioners contend was erroneous. Fourth, the use of spot samples overestimated the actual exposure of individuals. Fifth, adding together the HIs of each individual phthalate resulted in an overestimation of the risk. Sixth, petitioners argue that the link between pre-natal exposure and antiandrogenic effects means that it is unreasonable to ban children's toys, which are certain to be used post-natal.

We are not free to second-guess the Commission's determinations as to statistical methods and scientific data.[178] In reviewing an agency decision, "[o]ur task is to determine whether the agency examined the pertinent evidence, considered the relevant factors, and articulated a 'reasonable explanation for how it reached its decision.'"[179] This standard is highly deferential; we apply a presumption of validity and may not substitute our judgment for that of the agency.[180] The Supreme Court has said that courts should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[181] Having reviewed the record and the Final Rule, we can discern the Commission's path for each of the six decisions above. Its

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[178] *Sw. Elec. Power Co. v. E.P.A.*, 920 F.3d 999, 1019 (5th Cir. 2019).

[179] *Assoc'd Builders and Contractors of Texas v. NLRB*, 826 F.3d 215, 219-20 (5th Cir. 2016) (quoting *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 410 (5th Cir. 1999).

[180] *Id.* (citing *FCC v. Fox Television. Stations, Inc.*, 556 U.S. 502, 513 (2009)).

[181] *Fox Television*, 556 U.S. at 513 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

explanations are not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[182]

V

Having found that the CPSC violated the APA by failing to allow proper notice-and-comment for its new justification and failing to consider the costs of continuing Congress's interim prohibition on DINP, the only remaining question is what remedy is appropriate. Petitioners urge vacatur. We are required to "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[183] However, "[o]nly in 'rare circumstances' is remand for agency reconsideration not the appropriate solution."[184] Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so.[185] In this case, there is a serious possibility that the CSPC will be able to remedy its failures.[186] The Commission must allow industry to comment and consider the new justification for the Final Rule. Further, it must consider the costs of continuing Congress's interim prohibition on DINP to determine whether the rule is "reasonably necessary" to protect from harm.

* * *

Accordingly, we retain jurisdiction and REMAND to the Commission to resolve the defects in its rule.

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[182] *Sw. Elec. Power Co.*, 920 F.3d at 1013 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutu. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotations omitted).

[183] 5 U.S.C. § 706(2).

[184] *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 238-39 (5th Cir. 2007) (citation omitted).

[185] *Central and South West Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000).

[186] *Cf Allied-Signal, Inc. v. N.R.C.*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (explaining that "[a]n inadequately supported rule . . . need not necessarily be vacated").

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL XAVIER BECERRA AND THE STATE WATER RESOURCES CONTROL BOARD, STATE OF WASHINGTON, STATE OF NEW YORK, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF RHODE ISLAND,

Case No.: 3:20-cv-4869

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*)

STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WISCONSIN, AND THE DISTRICT OF COLUMBIA,

Plaintiffs,

v.

ANDREW R. WHEELER, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Plaintiffs, the States of California, Washington, New York, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Wisconsin, the Commonwealths of Massachusetts and Virginia, the District of Columbia, and the California State Water Resources Control Board, by and through their respective Attorneys General, allege as follows against defendants Andrew R. Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency (EPA), and EPA (collectively, Defendants):

INTRODUCTION

1.1 This lawsuit challenges a final rule issued by the Defendants, entitled "Updating Regulations on Water Quality Certification," 85 Fed. Reg. 42,210 (July 13, 2020) (Rule). The Rule upends fifty years of cooperative federalism by arbitrarily re-writing EPA's existing water quality certification regulations to unlawfully curtail state authority under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. (CWA or the Act).

1.2 The CWA's primary objective is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In achieving that goal, Congress recognized the critical and important role states play in protecting and enhancing waters within their respective borders. *Id.* § 1251(b). And, Congress sought to preserve the States' preexisting and broad authority to protect their waters. To those ends, the Act specifically provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the

development and use (including restoration, preservation, and enhancement) of land and water resources ….” *Id*.

1.3 This preservation of state authority is present throughout the Act. Congress preserved for each State the authority to adopt or enforce the conditions and restrictions the state deems necessary to protect its state waters, so long as the state does not adopt standards that are less protective of waters than federal standards. *Id*. § 1370. State standards, including those of the Plaintiff States, may be and frequently are more protective. And, critical to the current action, Congress in section 401 of the Act, 33 U.S.C. § 1341 (section 401), expressly authorized States to independently review the water quality impacts of projects that may result in a discharge and that require a federal license or permit to ensure that such projects do not violate state water quality laws.

1.4 Where a State denies a water quality certification under section 401, Congress specifically prohibited federal agencies from permitting or licensing such projects. *Id.* § 1341(a)(1).

1.5 Congress also broadly authorized States to include conditions in state certifications necessary to ensure an applicant’s compliance with any “appropriate requirement of State law.” *Id.* § 1341(a), (d). The conditions in state certifications must be incorporated as conditions in federal permits. *Id*. § 1341(d). In this way, section 401 prevents the federal government from using its licensing and permitting authority to authorize projects that could violate state water quality laws. *See generally, id.* § 1341.

1.6 EPA has long acknowledged and respected the powers preserved for the States in section 401. In fact, until 2019, EPA’s regulations and every guidance document issued by EPA for section 401 certifications—spanning three decades and four administrations—expressly recognized states’ broad authority under section 401 to condition or deny certification of federally permitted or licensed projects within their borders. The Supreme Court and Circuit Courts of Appeals have affirmed that broad state authority under section 401.

1.7 In April 2019, however, President Trump signed Executive Order 13868, directing EPA to issue regulations that reduce the purported burdens current section 401 certification

requirements place on energy infrastructure project approval and development, thus effectively prioritizing such projects over water quality protection. Executive Order on Promoting Energy Infrastructure and Economic Growth, 84 Fed. Reg. 15,495 (Apr. 15, 2019) (Executive Order 13868). EPA issued the Rule pursuant to Executive Order 13868.

1.8 The Rule violates the Act and unlawfully usurps state authority to protect the quality of waters within their borders.

1.9 Contrary to the language of section 401, Supreme Court precedent, and EPA's long-standing interpretation, the Rule prohibits States, including Plaintiff States, from considering how a federally approved project, as a whole, will impact state water quality, instead unlawfully limiting the scope of state review and decision-making to point source discharges into narrowly defined waters of the United States. *Cf. PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology* (*PUD No. 1*), 511 U.S. 700, 711 (1994) ("The language of [Section 401(d)] contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge'" because the text "allows the State to impose 'other limitations' on the project in general.").

1.10 Similarly, the Rule would unlawfully limit states' review and decision-making authority under section 401 by allowing only consideration of whether a federally licensed project will comply with state water quality standards and requirements regulating point source discharges. But section 401 contains no such limitation, instead broadly authorizing States to impose any condition necessary to ensure an applicant complies with "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Both EPA and the Courts have long recognized the broad scope of the phrase "appropriate requirement of State law." *See PUD No. 1*, 511 U.S. at 712-13 (Section 401(d) "author[izes] additional conditions and limitations on the activity as a whole"; these conditions and limitations include "state water quality standards … [which] are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process").

1.11 The Rule would also interfere with the States' ability to apply their own administrative procedures to their review of applications for water quality certification, instead

imposing onerous federal control over virtually every step of the administrative process. The Rule requires States to take action within a time limit imposed by the federal permitting agency based on a minimal list of required information. State agencies appear to be discouraged from obtaining additional information if that information cannot be developed and provided within that time limit, even for major infrastructure projects that pose significant risk to a wide variety of state water resources for decades. Even when a State is able to make a certification decision before the expiration of the time limit imposed by the federal agency, the federal agency could *still* determine that the State waived its authority if it concludes that the State failed to provide certain information to the federal agency required by the Rule. This Federal dictate of state administrative procedures is fundamentally inconsistent with the cooperative federalism scheme established by the CWA in general, and with the preservation of broad state authority affirmed by section 401 in particular.

1.12 EPA's departure from 50 years of consistent administrative and judicial precedent by narrowing state authority under section 401 is contrary to Congress's 1972 enactment of the CWA, which by its terms expressly preserved state authority by incorporating the language of section 401 essentially unchanged from its predecessor statute, the Water Quality Improvement Act of 1970. EPA claims that this drastic change is justified based on its "first holistic analysis of the statutory text, legislative history, and relevant case law." 85 Fed. Reg. at 42,215. However, nothing in the text, purpose, or legislative history of section 401, no matter how "holistically" considered, supports the Rule's substantial infringement on state authority. The Rule unlawfully interprets a statute that is "essential in the scheme to preserve state authority to address the broad range of pollution" affecting state waters, *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (*S.D. Warren*), to instead restrict state authority to do so.

1.13 By attempting to limit the scope of state section 401 water quality certifications and by imposing new, unjustified, and unreasonable substantive limits, time constraints, and procedural restrictions on States' review of and decisions on section 401 certification applications, the Rule is a radical departure from past EPA policy and practice, is unlawful, and

abandons the decades-long successful cooperative federalism approach Congress intended in the CWA.

1.14 As set forth below, the Rule is arbitrary, capricious, an abuse of discretion, contrary to the CWA and binding precedent, and in excess of EPA's authority under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C). Accordingly, Plaintiff States seek a declaration that the Rule violates the Clean Water Act and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA), and request that the Court set aside and vacate the Rule.

JURISDICTION AND VENUE

2.1 This action raises federal questions and arises under the CWA and the APA. This Court has jurisdiction over the States' claims pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States) and 5 U.S.C. §§ 701-706. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory, injunctive, and other relief pursuant to 28 U.S.C. §§ 2201-2202, and 5 U.S.C. §§ 701-706.

2.2 The United States has waived sovereign immunity for claims arising under the APA. 5 U.S.C. § 702.

2.3 The States are "persons" within the meaning of 5 U.S.C. § 551(2), authorized to bring suit under the APA to challenge unlawful final agency action. 5 U.S.C. §§ 701(2), 702.

2.4 Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C) because plaintiff State of California resides within the district and this action seeks relief against federal agencies and officials acting in their official capacities.

INTRADISTRICT ASSIGNMENT

3.1 Pursuant to Civil Local Rules 3-5(b) and 3-2(c), there is no basis for assignment of this action to any particular location or division of this Court.

PARTIES

4.1 The Plaintiff States are sovereign states of the United States of America. The States bring this action in their sovereign and proprietary capacities. As set out below, the Rule directly harms the States' interests, including, but not limited to, environmental harms, financial harms that flow from implementing EPA's radical shift in policy, and limits on powers

specifically reserved to the States by Congress in the Act. The States also bring this action as *parens patriae* on behalf of their citizens and residents to protect public health, safety, and welfare, their waters, natural resources, and environment, and their economies.

4.2 Defendant EPA is the federal agency with primary regulatory authority under the Act and bears responsibility, in whole or in part, for the acts complained of in this Complaint.

4.3 Defendant Andrew R. Wheeler is sued in his official capacity as Administrator of the EPA and bears responsibility, in whole or in part, for the acts complained of in this Complaint.

STATUTORY AND REGULATORY BACKGROUND

The Administrative Procedure Act

5.1 Federal agencies are required to comply with the APA's rulemaking requirements in amending or repealing a rule.

5.2 Under the APA, a federal agency must publish notice of a proposed rulemaking in the Federal Register and "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c).

5.3 "[R]ule making" means "agency process for formulating, amending, or repealing a rule." *Id*. § 551(5).

5.4 An agency that promulgates a rule that modifies its long-standing policy or practice must articulate a reasoned explanation and rational basis for the modification and must consider and evaluate the reliance interests engendered by the agency's prior position. *See, e.g., Dep't of Homeland Security v. Regents of the University of Ca.*, ___ S. Ct. ___, Slip Op. at 23-26 (June 18, 2020); *Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *see also* 5 U.S.C. § 706(2)(C).

5.5 The APA authorizes this Court to "hold unlawful and set aside agency action, findings and conclusions" it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law" or taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

The Clean Water Act

5.6 The Act's objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

5.7 In furtherance of that primary objective, Congress both preserved and enhanced the States' authority to protect the quality of state waters. The Act provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources …." *Id*. § 1251(b). As such, "Congress expressed its respect for states' role[s] through a scheme of cooperative federalism …." *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007).

5.8 Congress's preservation of pre-existing state authority is evident throughout the Act. For example, section 303 of the Act authorizes states, subject to baseline federal standards, to determine the level of water quality they will require and the means and mechanisms through which they will achieve and maintain those levels. 33 U.S.C. § 1313.

5.9 Section 510 of the Act states that "nothing in [the Act] shall … preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution" as long as such requirements are at least as stringent as the Act. *Id*. § 1370.

5.10 Section 401 of the Act provides that "[a]ny applicant for a Federal license or permit to conduct any activity … which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate … that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." *Id*. § 1341(a)(1). Section 401(d) broadly states that "[a]ny certification provided … shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a

Federal license or permit will comply with any applicable effluent limitations and other limitations … and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section." *Id*. § 1341(d).

5.11 The authority reserved to States in section 401 is meaningful and significant. In enacting section 401, Congress sought to ensure that all activities authorized by the federal government that may result in a discharge would comply with "State law" and that "Federal licensing or permitting agencies [could not] override State water quality requirements." S. Rep. 92-313, at 69, *reproduced in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972 ("Legislative History Vol. 2"), at 1487 (1973).

5.12 States' authority under section 401 to impose conditions on a federally permitted or licensed project is not limited to water quality controls specifically tied to a "discharge." Rather, section 401 "allows [states] to impose 'other limitations' on the project in general to assure compliance with various provisions of the Act and with 'any other appropriate requirement of State law.'" *PUD No. 1*, 511 U.S. at 711. Thus, while section 401(a)(1) "identifies the category of activities subject to certification—namely, those with discharges"—section 401(d) authorizes additional conditions and limitations "*on the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied." *Id*. at 711-12 (emphasis added). Section 401's "terms have a broad reach, requiring state approval any time a federally licensed activity 'may' result in a discharge…, and its object comprehends maintaining state water quality standards." *S.D. Warren*, 547 U.S. at 380. Furthermore, "Congress intended that [through section 401, States] would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

5.13 The Act imposes only one restriction on the timeframe of state certification review and decision-making: if a State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived." 33 U.S.C. § 1341.

5.14 In the quarter of a century since the Supreme Court's decision in *PUD No. 1*, Congress has not limited or otherwise amended the language of section 401.

EPA's Longstanding Section 401 Regulations and Guidance

5.15 In 1971, EPA promulgated regulations regarding state water quality certifications pursuant to section 21(b) of the Water Quality Improvement Act of 1970—the CWA's predecessor (1971 Regulations). *See* 36 Fed. Reg. 22,369, 22,487 (Nov. 25, 1971). Congress carried over the provisions of section 21(b) in section 401 of the CWA of 1972 with only "minor" changes. Senate Debate on S. 2770 (Nov. 2, 1971), *reproduced in* Legislative History Vol. 2 at 1394.

5.16 In the Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act, Congress directed EPA to "promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section [401] of this [Act] or permit application pursuant to section 402 of this [Act]." 33 U.S.C. § 1314(h). This is the only instruction that Congress gave EPA with regards to implementing section 401. EPA did so, as codified in 40 C.F.R. Part 136 (defining the scientific methods for analyzing a wide array of pollutants).

5.17 Following the 1972 amendments and the enactment of section 401, Congress directed EPA to modify other existing regulations but did not direct EPA to revise its existing 1971 Regulations.

5.18 Accordingly, EPA continued to apply the 1971 Regulations to implement section 401 following the CWA's enactment in 1972.

5.19 Not only does the Rule conflict with the Act's express protection of state interests under section 401, the Rule is a significant departure from, and contrary to, EPA's 1971 Regulations.

5.20 Pursuant to EPA's 1971 Regulations, when issuing a section 401 certification, states are required to include a statement certifying that a permitted "activity," not just a point source discharge, will comply with water quality standards. *See* former 40 C.F.R. § 121.2(a)(3) (June 7, 1979). Furthermore, "water quality standards" was broadly defined to include standards

established pursuant to the CWA, as well as any "State-adopted water quality standards." *Id.* § 121.1(g).

5.21 The 1971 Regulations did not permit federal agencies to determine whether state denials or conditional certifications met specified requirements and were therefore effective or not. Moreover, a State could only waive its authority under section 401 if it provided express written notification of such waiver or failed to act on a certification request within a reasonable period of time. *Id.* § 121.16(b) (June 7, 1979).

5.22 In April 1989, EPA's Office of Water issued a section 401 certification guidance document entitled "Wetlands and 401 Certification—Opportunities and Guidelines for States and Eligible Indian Tribes" (1989 Guidance).

5.23 EPA's 1989 Guidance acknowledged that section 401 "is written very broadly with respect to the activities it covers." 1989 Guidance at 20. The 1989 Guidance further stated that "'[a]ny activity, including, but not limited to, the construction or operation of facilities which *may* result in *any discharge*' requires water quality certification." *Id.* (emphasis in original). The 1989 Guidance explained that the purpose of the water quality certification requirement in section 401, "was to ensure that no license or permit would be issued for an activity that through inadequate planning or otherwise could in fact become a source of pollution." *Id.* at 20.

5.24 The 1989 Guidance contemplated broad state review of federally permitted or licensed projects and stating the "imperative" principle that "all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation—should be part of a State's [401] certification review." *Id.* at 22, 23. The 1989 Guidance also provided examples of conditions that States had successfully placed on section 401 certifications. These included watershed management plans, fish stocking, and noxious weed controls. *Id.* at 24, 54-55. EPA noted that "[w]hile few of these conditions [were] based on traditional water quality standards, all [were] valid" under section 401. *Id.* at 24. EPA further noted that "[s]ome of the conditions [were] clearly requirements of State or local law related to water quality other than those promulgated pursuant to the [CWA] sections enumerated in Section 401(a)(1)." *Id.*

5.25 Consistent with the text of section 401 and EPA's 1971 Regulations, the 1989 Guidance narrowly construed the circumstances under which a State would waive its authority to review certification requests under section 401: a waiver would be deemed to have occurred only if a state failed to act within "a reasonable period of time (which shall not exceed one year) after receipt" of a certification request. *Id*. at 31.

5.26 The 1989 Guidance also advised States to adopt regulations requiring that applicants submit information to ensure informed decision-making. *Id*. Further, the 1989 Guidance encouraged States to "link the timing for review to what is considered a receipt of a complete application." *Id*. As an example, EPA cited a Wisconsin regulation requiring a "complete" application before the agency review time began. *Id*., *citing* Wisconsin Administrative Code, NR 299.04. The 1989 Guidance noted that pursuant to the same Wisconsin regulation, the state agency would review an application for completeness within 30 days of receipt and could request any additional information needed to make a certification decision. *Id*. (currently, these requirements are codified in Wisconsin Administrative Code, NR 299.03).

5.27 EPA issued additional section 401 guidance in April 2010 entitled "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes" (2010 Guidance). The 2010 Guidance was consistent with and affirmed EPA's longstanding recognition of States' broad authority preserved under the CWA and enhanced by section 401.

5.28 In the 2010 Guidance, EPA stated that, "[a]s incorporated into the 1972 [CWA], § 401 water quality certification was intended to ensure that no federal license or permit would be issued that would prevent states or tribes from achieving their water quality goals, or that would violate [the Act's] provisions." 2010 Guidance at 16. Relying on the Supreme Court's controlling decision in *PUD No. 1*, the 2010 Guidance confirmed that "once § 401 is triggered, the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law." *Id*. at 18. For example, EPA explained that "water quality implications of fertilizer and herbicide use on a subdivision and golf course might be

considered as part of a § 401 certification analysis of a CWA § 404 permit that would authorize discharge of dredged or fill material to construct the subdivision and golf course." *Id*.

5.29 In line with EPA's long-standing position, the 2010 Guidance maintained an expansive view of the scope of other state laws appropriately considered under section 401 certification reviews: "It is important to note that, while EPA-approved state and tribal water quality standards may be a major consideration driving § 401 decision[s], they are not the only consideration." *Id*. at 16.

5.30 The 2010 Guidance acknowledged that States establish requirements for what constitutes a complete application and highlighted the fact that the timeframe for state review of a section 401 certification request "begins once a request for certification has been made to the certifying agency, *accompanied by a complete application*." *Id*. at 15-16 (emphasis added).

5.31 In the years following EPA's issuance of its 1989 and 2010 guidance documents, Congress has neither limited nor otherwise amended the language of section 401.

Executive Order 13868 and Section 401 Certifications

5.32 On April 10, 2019, President Trump issued Executive Order 13868, upending EPA's longstanding broad interpretation of state authority to protect water quality under section 401.

5.33 Intended to promote and speed infrastructure development, particularly in the coal, oil, and natural gas sectors, Executive Order 13868 directed EPA to evaluate ways in which section 401 certifications have "hindered the development of energy infrastructure." 84 Fed. Reg. at 15,496. Executive Order 13868 failed to acknowledge the critical role of section 401 certifications to the Act's primary purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters, and to preserving States' authority to do so.

5.34 Executive Order 13868 directed the EPA Administrator to undertake a number of actions related to section 401 certifications. First, Executive Order 13868 required the Administrator, within 60 days, to (1) examine the 2010 Guidance and issue superseding guidance to States and authorized tribes; and (2) issue guidance to agencies to reduce the burdens on energy infrastructure projects caused by section 401's certification requirements. Second,

Executive Order 13868 required the Administrator, within 120 days, to review EPA's section 401 regulations for consistency with Executive Order 13868's energy infrastructure and economic growth goals and publish revised regulations consistent with those goals. Third, Executive Order 13868 required the Administrator to finalize the revised regulations no later than 13 months from April 10, 2019.

5.35 Executive Order 13868 also required all federal agencies that issue licenses or permits requiring section 401 certification to, within 90 days of the final EPA Rule, "initiate a rulemaking to ensure their respective agencies' regulations are consistent with" the EPA Rule. Exec. Order No. 13868, Sec. 3(d).

5.36 In response to Executive Order 13868, on June 7, 2019, EPA issued a document entitled "Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes" with a stated purpose of facilitating implementation of Executive Order 13868 (2019 Guidance). The 2019 Guidance attempted to impose substantially shorter timeframes for, and narrow the permissible scope of, state review. Although the 2019 Guidance was issued without notice and opportunity for comment, all of the Plaintiff States submitted a letter to EPA objecting to the guidance. Concurrently, the EPA Administrator informed the States he was withdrawing and rescinding the 2010 Guidance.

5.37 On August 22, 2019, EPA published the proposed Rule in the Federal Register with only a 60-day public comment period that closed on October 21, 2019. 84 Fed. Reg. 44,080.

5.38 Along with the proposed Rule, EPA published its "Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking" (Economic Analysis). In keeping with Executive Order 13868, the 23-page Economic Analysis focused largely on the economic effects of states' section 401 certification conditions and denials for the energy industry projects.

5.39 The Economic Analysis failed to consider the potential economic impacts from decreased water quality caused by the Rule's limitations on the scope of States' section 401 authority.

5.40 EPA held public hearings on the proposed Rule on September 5, 2019, and September 6, 2019, in Salt Lake City, Utah. Several Plaintiff States gave oral testimony at the

public hearings, including Washington and New York. Plaintiff States also submitted written comments on the proposed Rule on October 17 and 21, 2019.

The Final Section 401 Rule

5.41 On June 1, 2020, EPA released a pre-publication version of the final Rule, entitled "Clean Water Act Section 401 Certification Rule." In announcing the final Rule, the Administrator stated that EPA was "following through on President Trump's Executive Order to curb abuses of the Clean Water Act that have held our nation's energy infrastructure projects hostage, and to put in place clear guidelines that finally give these projects a path forward."[1]

5.42 On July 13, 2020, EPA published the final Rule in the Federal Register. 85 Fed. Reg. 42,210. By its terms, the Rule becomes effective 60 days following the publication date.

5.43 The final Rule is a radical departure from prior EPA policy and practice regarding section 401, drastically curtailing state authority under section 401 in a way that is contrary to: (1) the plain language, structure, purpose, and legislative history of the CWA; (2) binding Supreme Court precedent interpreting section 401; and (3) EPA's own guidance on section 401, which spans decades and multiple administrations, resulting in significant reliance by the States. Moreover, the Rule unlawfully limits States' section 401 authority.

5.44 The Rule asserts, without rational basis, that it will reduce regulatory uncertainty and increase predictability for States, tribes and project proponents. 85 Fed. Reg. at 42,236, 42,242. The Rule conflicts with the CWA's text, structure, purpose, and intent, as well as longstanding agency guidance and controlling precedent, and forces the States to amend their own section 401 laws. As a result, the Rule will in fact cause increased confusion and uncertainty that will ensue while the States attempt to revise their statutes and regulations related to section 401 and the States, federal agencies, and project proponents litigate and attempt to implement and comply with the Rule's requirements.

[1] https://www.epa.gov/newsreleases/epa-issues-final-rule-helps-ensure-us-energy-security-and-limits-misuse-clean-water-0

Limits on Scope of Section 401 Certification Review

5.45 The Rule unlawfully limits the applicability and scope of section 401 certifications to impacts from specific, point source discharges to waters of the United States, thus prohibiting States from conditioning water quality certifications to assure the effects of the project as a whole do not violate water quality standards. 85 Fed. Reg. 42,285 (to be codified at 40 C.F.R. §§ 121.1; 121.3).

5.46 Confining the scope of section 401 certification to point source discharges is contrary to the Act's plain language and the Supreme Court's decision in *PUD No. 1*. In *PUD No. 1*, the Supreme Court held that, while section 401(a)(1) "identifies the category of activities subject to certification—namely, those with discharges"—section 401(d) "is most reasonably read as authorizing additional conditions and limitations on *the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied." *Id*. at 711-12 (emphasis added).

5.47 EPA acknowledges that the Rule departs from the controlling precedent in *PUD No. 1*, *see, e.g.,* 85 Fed. Reg. at 42,231, but asserts that *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005) (*Brand X*) allows EPA to effectively overrule the Supreme Court's *PUD No. 1* decision. *Brand X*, however, does not permit EPA to overrule binding Supreme Court precedent or adopt an interpretation that is not in accordance with the law.

5.48 In limiting the scope of section 401 certifications to impacts from specific, point source discharges, the Rule abandons without a rational explanation EPA's previous position articulated in the 1989 Guidance that "it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project." 1989 Guidance at 22. Similarly, the Rule abandons without a rational explanation EPA's position set forth in the 2010 Guidance that "the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law." 2010 Guidance at 18.

Limits on Appropriate Requirements of State Law

5.49 In direct conflict with the Act's language and Congressional intent, the Rule also unlawfully limits the term "other appropriate requirements of State law" in Section 401(d) to "water quality requirements," newly defined as the "applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States." *See* 85 Fed. Reg. at 42232 (to be codified as 40 C.F.R. § 121.1(n))

5.50 By restricting the definition of "water quality requirements," the Rule potentially excludes a broad range of state and tribal law directly applicable to water quality that has been used for decades to evaluate and condition federally licensed or permitted projects.

5.51 In limiting "water quality requirements" only to specified provisions of the Act and those state and tribal laws related to "point source discharges," the Rule not only abandons but runs contrary to EPA's longstanding position that "[t]he legislative history of [section 401] indicates that the Congress meant for the States to impose whatever conditions on [federally permitted projects] are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns." 1989 Guidance at 23.

5.52 The Rule also departs from EPA's longstanding position that "[t]he legislative history of Section 401(d) indicates that Congress meant for the States to condition certifications on compliance with any State and local law requirements related to water quality preservation" and that "conditions that relate in any way to water quality maintenance are appropriate." *Id*. at 25-26.

5.53 EPA fails to provide a rational explanation for its complete departure from its longstanding interpretation of section 401. With its sudden departure from an established regulatory approach, EPA also failed to consider the reliance interests of states that have developed section 401 certification procedures and water quality control programs in reliance on EPA's prior, longstanding interpretation of section 401.

Restrictions on Certification Request Process

5.54 The Rule also sets out new procedures for the submission and evaluation of section 401 certification requests. These procedures plainly conflict with the CWA's text and purpose.

5.55 Prior to the Rule, the States or other certifying authorities and EPA together determined the types of information an applicant was required to submit in a section 401 certification request. In contrast, the Rule enumerates an insufficient and minimal list of information project proponents are directed to provide in a section 401 certification application. *Compare* 40 C.F.R. § 121.3 (June 7, 1979), *with* 85 Fed. Reg. at 42,285 (to be codified as 40 C.F.R. § 121.5). Contrary to *PUD No. 1*, the Rule does not require project applicants to provide information related to the water quality impacts caused by the proposed activity as a whole. Rather, the Rule merely requires each applicant to identify the "location and nature" of potential discharges and the "methods and means" by which the discharge(s) will be monitored and managed, along with other, limited information. 85 Fed. Reg. at 42,285 (to be codified as 40 C.F.R. § 121.5f(b)-(c)).

5.56 Although the Rule allows States and other certifying authorities to request additional information from project applicants, EPA attempts to limit this in the Preamble by suggesting that—regardless of whether such information is sufficient to fully evaluate water quality impacts—the requested information is to be limited to whatever can be "produced and evaluated within the reasonable time." 85 Fed. Reg. at 42,246.

5.57 The Rule also sets out a procedure whereby federal agencies must establish a "reasonable period of time" by which certifying authorities must act on requests for section 401 certifications, either categorically or on a case-by-case basis. 85 Fed. Reg. at 42,285-286 (to be codified as 40 C.F.R. § 121.6). Pursuant to the Rule, this time period cannot exceed one year under any circumstances. *Id.* (to be codified as 40 C.F.R. § 121.6(a)). Moreover, this reasonable time period is to be measured from the certifying authority's "receipt" of the certification request, rather than the certifying authority's receipt of the complete certification application. *Id*. at 42,285 (to be codified as 40 C.F.R. § 121.1(m)).

5.58 The Rule further prohibits a certifying authority from requesting that a project applicant withdraw a certification request and resubmit it with additional information to extend the timeframe for review, even where the request lacks information necessary for the certifying authority to conduct a proper review. *Id*. at 42,285-286 (to be codified as 40 C.F.R. § 121.6(e)). This interpretation is in conflict with section 401's purpose of preserving state authority.

5.59 The Rule prescribes a broad range of circumstances under which a state's section 401 review authority is deemed waived because of a state's purported failure to follow certain newly-included procedural requirements. *Id.* (to be codified as 40 C.F.R. § 121.9). Where a certifying authority fails to grant, grants with conditions, or denies a certification application within the reasonable time period, as determined by the federal agency, it waives its ability to do so. *Id*. (to be codified as 40 C.F.R. § 121.9(a)(2)). Additionally, where a certifying authority does not meet the Rule's procedural requirements in certifying or denying a section 401 application, the certification or denial will be deemed waived. *Id*. And where a condition imposed by a certifying authority is not supported by the required information, the condition is deemed waived. *Id*. In addition, where a certifying authority certifies an application without following the procedural requirements set forth in the Rule, the certification will be deemed waived. *Id*. (to be codified as 40 C.F.R. § 121.9(b)).

5.60 Taken together, these procedural requirements of the Rule impermissibly expand the waiver provision of section 401 in conflict with the Act's language and Congressional intent.

5.61 Further, these procedural requirements of the Rule significantly impair the ability of States and other certifying authorities to fully and efficiently review project proposals for water quality impacts and will likely result in an increase of certification denials for lack of sufficient information.

5.62 These unprecedented restrictions also conflict with existing state practices, procedures, and regulations on initiating section 401 certification review, many of which were developed in reliance on EPA's long-standing position on these requirements.

HARMS TO PLAINTIFF STATES

6.1 The Rule harms the sovereign, environmental, economic, and proprietary interests of Plaintiff States.

6.2 The States' respective jurisdictions encompass a substantial portion of the United States. Along with countless other waterbodies and wetlands, the water resources found within Plaintiff States include the entirety of the Pacific Coast from Mexico to Canada, large portions of the Atlantic Coast, the Great Lakes and Lake Champlain, Chesapeake Bay and its tributaries, and the majority of the Columbia River. Plaintiff States contain headwaters formed in the Sierra Nevada, Cascades, Rocky, and Appalachia mountains. Many of the nation's largest rivers originate in and/or flow through the Plaintiff States, including the Mississippi, the Columbia, the Colorado, and the Hudson. The States have a fundamental obligation to protect these waters and wetlands, both for their own economic interests and on behalf of the millions of residents and thousands of wildlife species that rely on them for survival. Many States also legally hold both the surface and groundwaters within their borders in trust for their residents.

6.3 The Rule significantly impairs Plaintiff States' abilities to protect the quality of these waters. In the Act, Congress preserved the States' broad, existing powers to adopt the conditions and restrictions necessary to protect state waters, so long as those efforts were not less protective than federal standards. To those ends, the States have long exercised section 401 authority to protect against adverse impacts to water quality from federally licensed or permitted activities within state borders.

6.4 As described in detail above, the Rule unlawfully curtails both the scope of water quality-related impacts that the States can address, and the sources of state law on which States can base certification review and decisions for federally licensed or permitted projects. For example, the Rule narrowly defines the scope of 401 certification as "limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." 85 Fed. Reg. 42,250. The definition of "water quality requirements" in the Rule, in turn, further narrows the scope to only specified provisions of the Act and state and tribal

regulatory requirements "for point source discharges into waters of the United States." 85 Fed. Reg. 42,285 (to be codified at 40 C.F.R. § 121.1(n)).

6.5 Consistent with longstanding relevant Supreme Court and lower court decisions, section 401 certification practice, and EPA guidance, when evaluating requests for section 401 certification the States have used section 401 to review all potential water quality impacts from a proposed project, both upstream and downstream and over the life of the proposed project. The States also have reviewed impacts as they relate to both "waters of the United States" and state waters, including groundwater, as defined under their respective state laws. In doing so, the States have assessed project impacts pursuant to a broad range of appropriate water-related state law requirements, including requirements applicable to both point and non-point sources of water pollution.

6.6 For example, the States have used section 401 authority to address water quality impacts that, depending on the circumstances, may not be non-point: turbidity associated with dam reservoir wave action and pool level fluctuations, aquatic habitat loss, contamination of groundwater supplies, contaminant loading from spills and discharges associated with over-water industrial activities, impacts on stream flows, and wetland fill. States have also used section 401 authority in the context of large water supply projects to require mitigation to address long-term impacts from operation, such as hydrologic modifications and water quality degradation associated with enhanced stratification in new and expanded reservoirs. Impacts such as stormwater runoff, whether or not related to any particular point source discharge contemplated by the Rule, may have significant detrimental effects on water quality in and around project sites. In the case of western water diversion projects, stormwater runoff may adversely impact different river basins. Section 401 certifications have been one of the primary mechanisms the States have used to mitigate these impacts when associated with federally licensed and permitted projects. The Rule's limitation to point source impacts will prevent States from addressing and preventing these harms under their section 401 authority, to the detriment of the States' proprietary interests in the quality of those waters, their related ecosystems, and the general health and well-being of their residents.

6.7 In addition to impacts to state waters themselves, the Rule also directly harms other state economic and proprietary interests.

6.8 For example, many States own or hold in trust the fish and other wildlife populations within their borders, and have certain statutory obligations to protect these resources. Because the Rule prevents the States from fully protecting the aquatic habitat and resources those species rely upon for survival, the Rule will result in direct harms to wildlife and wildlife populations.

6.9 Increased pollution, degradation and loss of waters, as well as other impacts to water quality as a result of the Rule also will impair the States' water recreation industries by making waters less desirable for fishing, boating, and swimming, and curtailing commercial and tax revenues associated with such activities.

6.10 The States have relied on the 1971 Regulations and EPA's longstanding practice and guidance interpreting section 401 broadly to authorize protection of water quality from federally licensed or permitted projects within their borders. Over the decades since the promulgation of the 1971 Regulations, the States have expended significant resources to develop and implement their own regulatory programs based on that broad interpretation of section 401. The Rule upends the States' section 401 programs and will force the States to significantly revise these programs to conform to the Rule's requirements.

6.11 The Rule will cause the States to incur direct financial harms. For example, the Rule will force States to hire additional personnel to process requests for section 401 certifications on the truncated timelines and with the additional procedures established by the Rule. Washington alone allocated over $600,000 to hire the additional staff it anticipates will be required in order to conduct section 401 certification reviews under the Rule. This expenditure is for the 2020 fiscal year alone, and is an expense that is expected to continue year-over-year well into the future. Connecticut anticipates needing to hire at least two additional professional staff, and Wisconsin estimates expending an additional $170,000 annually for additional staff to comply with the Rule. While state budgets are nearly always constrained, the effective date of the

Rule comes during that time when states are facing a projected $555 billion shortfall over the next two fiscal years due to the impact of the COVID-19 pandemic.

6.12 Most, if not all, of the States will incur costs related to the expensive and time-consuming process of revising their laws and regulations in order to conform to the Rule.

6.13 New Jersey, New York, and California, among other states, have robust application review and public comment processes outlined in both state law and regulation that will need to be overhauled in light of the Rule and EPA's dramatic shift in section 401 policy. These changes to state laws and regulations require investment of the same regulatory resources required to review and process section 401 certifications, none of which were considered in EPA's economic review of the proposed rule and potential harms.

6.14 Finally, the States have relied on EPA's longstanding and consistent interpretation of section 401 as conferring broad authority on the States to protect water quality within their respective jurisdictions, whether those impacts occur from a specific discharge or by operation of a project as a whole, consistent with the statutory text and Supreme Court precedent.

6.15 By abandoning this long-standing position and policy, the Rule substantially degrades the primary mechanism by which States have ameliorated or avoided impacts to state waters from federally licensed and/or permitted activities, contrary to Congress's intent. As a result, the Rule forces the States either to incur the financial and administrative burdens associated with instituting or expanding their water protection programs or to bear the burdens of degraded waters.

6.16 Expanding water protection programs will require difficult and time-consuming processes involving state program creation and expansion, state legislative and regulatory changes, and state appropriation and expenditures. And, the Rule compromises the States' long reliance on section 401 to ensure the full scope of state water quality protections apply to activities that are otherwise preempted from state regulation.

6.17 Applicants for section 401 certification have also relied on EPA's longstanding position that section 401 allows an applicant to work with a state certifying authority to define a mutually acceptable scope and timeframe for agency review. By forcing state certifying agencies

to unnecessarily limit the scope and timeframe of their review, the Rule increases the chances that section 401 requests will be needlessly denied, leading to administrative inefficiencies and unnecessary litigation, and the loss or delayed benefits of projects that would have been certified had the States been operating under the previous regime. In its haste to promote energy infrastructure pursuant to President Trump's Executive Order—a consideration that is not entertained in any capacity by the text or purpose of the Act—EPA utterly failed to assess the unintended impacts the Rule will have on the States and the regulated parties seeking certification under section 401.

6.18 The relief sought herein will redress these and other injuries caused by the Rule.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Arbitrary and Capricious and Not in Accordance with Law
Unlawful Implementation of Section 401 of the Clean Water Act
in Violation of the Administrative Procedure Act
(5 U.S.C. § 706)

7.1 Plaintiff States re-allege the facts set out in Paragraphs 1.1 through 6.18 as though fully set out herein.

7.2 The APA provides that this Court "shall" "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A).

7.3 Agency action is not in accordance with the law if the agency fails to interpret and implement the statutory language consistent with the statute's text, structure, and purpose and with controlling Supreme Court precedent.

7.4 The Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7, 121.8, and 121.9, is an unlawful and impermissible implementation of section 401 of the Clean Water Act, 33 U.S.C. § 1341, as interpreted by the United States Supreme Court, because it unlawfully limits the States' authority granted to them by Congress through enactment of the Act.

7.5 As a result, the Rule must be set aside as arbitrary, capricious, and not in accordance with law.

SECOND CAUSE OF ACTION
Arbitrary and Capricious and Not in Accordance with Law
Disregard of Prior Agency Policy and Practice
in Violation of the Administrative Procedure Act
(5 U.S.C. § 706)

7.6 Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as though fully set out herein.

7.7 When an agency promulgates a rule that modifies its long-standing policy or practice, it must articulate a reasoned explanation and provide a rational basis for doing so.

7.8 An agency modifying or abandoning its long-standing policy or position must consider and take into account the reliance interests that are impacted by the change.

7.9 In adopting the Rule, Defendants failed to provide a reasoned explanation for defying the Supreme Court's long-standing interpretation of section 401 and abandoning their own long-standing policy and practice of interpreting section 401 as a broad reservation of states' rights.

7.10 The Rule lacks a rational basis because—despite EPA's assertions to the contrary—the Rule will increase uncertainty and decrease predictability in the section 401 certification process.

7.11 Defendants also failed to consider and take into account the serious reliance interests engendered by the Agency's prior long-standing policy and position regarding state authority under section 401.

7.12 For these reasons, the Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7, 121.8, and 121.9, is arbitrary, capricious, and not in accordance with law, and must be set aside.

THIRD CAUSE OF ACTION
Arbitrary and Capricious and Not in Accordance with Law
Failure to Consider Statutory Objective and Impacts on Water Quality
in Violation of the Administrative Procedure Act
(5 U.S.C. § 706)

7.13 Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as though fully set out herein.

7.14 Agency action is not in accordance with law if the agency fails to consider the applicable statutory requirements.

7.15 Agency action is arbitrary and capricious if the agency fails to consider important issues, considers issues that Congress did not intend for it to consider, or fails to articulate a reasoned explanation for the action.

7.16 When Defendants promulgated the Rule, they were required to consider whether it met the Act's objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters as set forth in 33 U.S.C. § 1251(a).

7.17 The protection of water quality is the paramount interest that must be considered by Defendants when promulgating regulations for the administration of the Clean Water Act, including those defining the contours of state authority to condition or deny section 401 certification requests.

7.18 Defendants promulgated the Rule without weighing its adverse impacts to the Nation's waters. Directed by an Executive Order aimed at increasing domestic energy production without any consideration of water quality, Defendants relied on factors that Congress did not intend for it to consider. Defendants also failed to consider how those impacts undermine, rather than further, the Act's objective of restoring and maintaining the integrity of the Nation's waters.

7.19 The Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7, 121.8, and 121.9, conflicts with the Clean Water Act's objective to protect water quality. As a result, the Rule is arbitrary and capricious and not in accordance with law.

FOURTH CAUSE OF ACTION
Agency Action in Excess of Jurisdiction
(5 U.S.C. § 706)

7.20 Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as though fully set out herein.

7.21 Under the APA, the Court "shall . . . set aside agency action" that is taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

7.22 In issuing the Rule, EPA relies on sections 401 and 501 of the Act. However, section 401 does not grant EPA any rulemaking authority for procedures and responsibilities expressly reserved for states, and section 501(a) limits EPA to prescribing "such regulations as are necessary to carry out [the Administrator's] functions under [the] Act." 33 U.S.C. § 1361.

7.23 The Rule exceeds EPA's authority to adopt regulations necessary to carry out the agency's functions under the Act, and instead intrudes on the "responsibilities and rights" Congress explicitly left to the states. *Id*. §§ 1251(b), 1341, 1361.

7.24 EPA also relies on section 304 of the Act, in which Congress directed EPA to, "promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 401 of this Act or permit application pursuant to section 402 of this Act." 33 U.S.C. § 1314(h). But nothing in section 304 authorizes EPA to promulgate regulations that infringe upon state authority or dictate state law or administrative procedures in reviewing requests for and granting or denying certifications pursuant to section 401.

7.25 Because the Rule exceeds EPA's rulemaking authority under the Act, it must be set aside.

RELIEF REQUESTED

WHEREFORE, the States respectfully request that this Court issue a judgment and order:

1. Declaring that in developing and adopting the Rule, EPA acted arbitrarily and capriciously and not in accordance with law, abused its discretion, and exceeded its statutory jurisdiction and authority;
2. Declaring the Rule unlawful, setting it aside, and vacating it;
3. Awarding the Plaintiff States their reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and

4. Awarding the Plaintiff States such additional and further relief as the Court may deem just, proper, and necessary.

Respectfully submitted this 21st day of July, 2020,

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** Application for admission pro hac vice pending or forthcoming*

SIGNATURE ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the other signatories.

DATED: July 21, 2020

/s/ Tatiana K. Gaur
Tatiana K. Gaur

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PROGRAM

Smithsonian
Anacostia Community Museum

SECOND Women's Environmental Leadership SUMMIT

September 13 & 14, 2019

National Education Association Headquarters
Washington, DC

SCHEDULE

AT A GLANCE

All events will be held in the News Conference Room except as noted in the program.

FRIDAY, SEPTEMBER 13

8:00–8:40 a.m. Registration & Continental Breakfast
8:45–8:55 a.m. Welcoming Remarks
9:00 a.m.–12:10 p.m. Panel Discussions

Morning Sessions

9:00–10:30 a.m.	The Environment Is Where We Live: A Holistic Approach to How We Work	Room A
	Placing Environmental Justice in the Larger Civil Rights Movement	Room B
10:40 a.m.–12:10 p.m.	Knowing Your Worth	Room A
	Living in Multiple Worlds: Community and Environmental Advocacy	Room B

Lunch
12:20–1:20 p.m.

Afternoon Workshops

1:30–2:45 p.m.	Documenting Your Waterways	Room A
	Climate Justice East of the Anacostia: Communities Prepared	Room B
2:55–4:10 p.m.	Self-Care and Environmental Advocacy	Room A
	Knowing Your Worth: A Practical Application	Room B

Report Outs
4:15–5:00 p.m.

Reception

5:00–6:00 p.m.		State Dining Room

SATURDAY, SEPTEMBER 14

8:00–8:40 a.m. Registration & Continental Breakfast
8:45–8:55 a.m. Welcoming Remarks
9:00 a.m.–12:10 p.m. Panel Discussions

Morning Sessions

9:00–10:30 a.m.	Cultural Practice as Environmental Activism	Room A
	Translating the Science: Research and Real-World Applications	Room B
10:40 a.m.–12:10 p.m.	Faith Communities and Environmental Advocacy	Room A
	The Environmentalists in Your Neighborhood	Room B

Lunch
12:20–1:20 p.m.

Afternoon Workshops

1:30–2:45 p.m.	You Are What You Eat: Food Justice and Health Justice in DC	Room A
	Youth Engagement Along the Anacostia	Room B
2:55–4:10 p.m.	Applying Civil Rights Law to Environmental Justice Issues	Room A
	Shaping Your Path: Career and Educational Opportunities in Environmental Studies	Room B

Report Outs
4:15–5:00 p.m.

Networking Event

5:00–6:00 p.m.		State Dining Room

Women's Environmental Leadership Initiative

MISSION

The Smithsonian Anacostia Community Museum's Women's Environmental Leadership initiative was launched in March 2018 with the convening of the **Preparing the Next Generation Summit and Women's Environmental Leadership Community Forum**. A national network of women environmental leaders and local next-generation leaders gathered for two days of face-to-face discussions focused on the importance of mentorship, educational and career opportunities, and the multitude of ways in which leadership is enacted. Discussion explored personal and professional journeys, best practices for galvanizing community, organizational, and governmental efforts, reflections on the impacts of community efforts, and next steps in confronting present and future environmental challenges. Additionally, attendees explored issues of particular importance to their neighborhoods and the Anacostia River and formulated action steps to continue their efforts to improve their communities and local waterways.

Thanks to support from the Smithsonian's American Women's History Initiative, in addition to the summit, the WEL initiative has been organizing a year of programming and documentation which includes a second summit, a series of oral histories, dinners and discussions, and the publication of *Do You Know…?*, all of which will highlight the personal and professional journeys of women who have advocated for the health of their communities at the local, national, and international levels.

Women's Environmental Leadership Initiative

URBAN WATERWAYS PROJECT

The WEL initiative emanated from the **Urban Waterways Project**, a long-term research and educational initiative based upon research on the Anacostia River and its watershed, as well as research examining how people engage with urban rivers in other communities. Formerly the Eastern Branch, the Anacostia River has long been considered one of the nation's most troubled urban rivers. The watershed covers more than 175 square miles and is one of the nation's most densely populated. The challenges facing the Anacostia River are problems confronting other rivers in the industrialized world. The project explores the impact of environmental burdens, resource depletion on urban communities, as well as the interplay of environmental and social conditions. The project also examines approaches and solutions on national and international levels through the study of civic oversight, community engagement, and environmental efforts. It has been undertaken by the Anacostia Community Museum with our local and national partners.

The Urban Waterways Project is particularly focused on working with communities on the frontline and those most affected by development and environmental impacts. The project seeks to 1) create cross-disciplinary dialogue among scholars, government officials, organizers, activists, and scientists; 2) elicit first-hand information from residents of local communities; and 3) engage with local residents and other interested parties with ongoing activities that will enable their participation in reclamation, restoration, and appropriate redevelopment of their urban waterways and surrounding communities.

Support for the Urban Waterways Project was made possible by the Smithsonian Consortium for Understanding the American Experience and the Consortium for Understanding and Sustaining a Biodiverse Planet.

Selected Urban Waterways Project Efforts and Engagements

RESEARCH AND DOCUMENTATION

Onsite Documentation. Anacostia Community Museum project team members documented how local, traditionally marginalized community members are developing strategies to bring their voices to local decision making. Documentation was conducted in Southeast Washington, DC, and adjacent communities, East London (2012), Los Angeles (2013), Hawai'i (2013, 2017), Baltimore (2014), Turkey Creek, MS (2014, 2015), and Spartanburg, SC (2016).

Photographic Documentation. More than 1,000 photographs have recorded such Anacostia River activities as the installation of Bandalong Trash Trap, Rice Rangers activities, festivals, Anacostia Watershed Society river clean-ups, rowing competitions, and recreational uses of the river. Photographs also include documentation of community-driven efforts in Los Angeles, Hawai'i, Baltimore, Turkey Creek, MS, and Spartanburg, SC.

Oral Histories. Eighty-eight interviews have been conducted with activists, stakeholders, and decision makers about environmental issues in Washington, DC, Baltimore, Spartanburg, SC, the Gulf Coast, Louisville, KY, Los Angeles, O'ahu, and London.

NETWORK DEVELOPMENT

Urban Waterways Newsletter. Since 2013, nine quarterly issues have covered the activities and strategies of our community partners in the Urban Waterways network. Topics explored include the impact of history on urban waterways, critical issues facing urban waterways and their communities, community collaboration, green economies, and faith.

Community Forums. Over 30 community forums have convened conversations among environmental activists, agency leaders, federal and local government officials, and citizen stakeholders. Among the topics addressed were strategies for improving distressed waterways and waterfronts, citizen science, diversifying the green movement, youth activism, climate justice east of the Anacostia, green jobs, and National Park Service involvement East of the River.

Urban Waterways Symposium, 2015. This day-long conference in Washington, DC, assembled a national network of project collaborators from diverse backgrounds and perspectives to exchange experiences and best practices focused on environmental activism and community engagement. The event convened non-profit and community leaders, scholars, and activists, developed national networks, and offered solutions to benefit residents, researchers, and decision makers.

Selected Urban Waterways Project Efforts and Engagements

continued

EDUCATION AND ENGAGEMENT

Major Exhibition. Based on research by the museum on the history, public use, and attitudes toward the Anacostia River and its watershed and reviews of urban waterway developments in Los Angeles, Pittsburgh, Louisville, KY, London, and Shanghai, *Reclaiming the Edge: Urban Waterways and Civic Engagement* explored various aspects of human interaction with natural resources in an urban setting. The 2012–2013 exhibition looked at densely populated watersheds and rivers as barriers to racial and ethnic integration and examined civic attempts to recover, clean up, re-imagine, and engineer urban rivers for community access and use. *Reclaiming the Edge* featured 75 objects, 16 artworks, 170 images, and 5 video stations, with original materials produced for the exhibition. Highlights included artworks by Chinese artist Zhang Jian-Jun, Chicano artist Leo Limón, and renowned Anacostia River photographer Bruce McNeil. Independent filmmaker Peter Byck contributed a piece on Louisville's Waterfront Development Corporation and the Waterfront Park. The exhibition was curated by Gail S. Lowe, PhD. John R. Wennersten, PhD, professor emeritus of the University of Maryland, Eastern Shore, served as consulting scholar.

Public Programs. Nearly 40 public workshops, films, fieldtrips, and in-school programming engaged participants in urban waterways issues. Highlights included a three-part photographic expedition on the Anacostia River with photographer Bruce McNeil; a day-long program for teachers featuring a tour of the *Reclaiming the Edge* exhibition; a visit to the Aquatic Resources Education Center and a water-testing project; a poetry program with Lewis MacAdams, founder of Friends of the Los Angeles River, and United Planning Organization's youth group; watershed explorations and off-site tours; summer youth educational fieldtrips; and a STEAM-based workshop for teachers and students on "Slick Fish Anatomy."

Women's Environmental Leadership Summit

SCHEDULE

ALL SESSIONS TAKE PLACE IN THE NEWS CONFERENCE ROOM EXCEPT AS NOTED.

DAY 1 FRIDAY

DAY 1

FRIDAY, SEPTEMBER 13, 2019

8:00–8:40 a.m.	**Registration & Continental Breakfast**	News Conference Room Hallway
8:45–8:55 a.m.	**Welcoming Remarks**	News Conference Room

MORNING PANEL DISCUSSIONS

Morning sessions will be recorded.

9:00–10:30 a.m. **CONCURRENT SESSIONS**

The Environment Is Where We Live: A Holistic Approach to How We Work

ROOM A

Through a discussion of community-led efforts to navigate the environmental impacts of the development of DC's Buzzard Point community, the panel will explore how multi-sector collaboration can effect change as communities address issues of inequitable environmental burdens and development.

MODERATOR	**Kari Fulton**, Organizer, Writer, Historian
PANELISTS	**C. Anneta Arno**, Director, Office of Health & Equity, DC Health **Rhonda Hamilton**, Advisory Neighborhood Commissioner and Advocate **Elgloria Harrison**, Associate Dean, College of Agriculture, Sustainability and Environmental Sciences, University of the District of Columbia

Women's Environmental Leadership Summit

1 DAY

continued

ALL SESSIONS TAKE PLACE IN THE NEWS CONFERENCE ROOM EXCEPT AS NOTED.

Placing Environmental Justice in the Larger Civil Rights Movement

ROOM B

Discussions will place environmental justice in the larger context of historical and contemporary justice movements, highlighting the efforts of the movement's early leaders, frameworks, and best practices.

MODERATOR **Vernice Miller-Travis**, Senior Advisor for Environmental Justice and Equitable Development, Skeo Solutions

PANELISTS **Katherine T. Egland**, Chair, NAACP National Board of Directors' Environmental and Climate Justice Committee
Caroline Farrell, Executive Director, Center on Race, Poverty & the Environment (CRPE)

10:40 a.m.–12:10 p.m. CONCURRENT SESSIONS

Knowing Your Worth

ROOM A

Panelists will share experiences and best practices for embarking on and navigating a career in environmental and community advocacy. The session will serve as a companion to the afternoon workshop *Knowing Your Worth: A Practical Application*, during which participants will develop personal action plans as they embark on the next steps of their education, career, and/or advocacy.

MODERATOR **Adrienne Hollis**, Lead Climate Justice Analyst, Union of Concerned Scientists

PANELISTS **Leslie G. Fields**, Director, Environmental Justice and Community Partnerships, Sierra Club
Irma R. Muñoz, Founder and President, Mujeres de la Tierra
Mamie A. Parker, President, Ma Parker and Associates

Living in Multiple Worlds: Community and Environmental Advocacy

ROOM B

Discussion will explore the experiences of individuals whose work and advocacy transgress constructed boundaries between efforts to advocate for the health of the environment, as it is traditionally defined, and the health of communities. Their efforts and subsequent impacts reflect the inherent intersections of all aspects of advocacy aimed at the founding of health equitable societies.

MODERATOR **Malini Ranganathan**, Assistant Professor, School of International Service, American University

PANELISTS **Susana De Anda**, Executive Director and Co-Founder, Community Water Center
Jeaninne Kayembe Oro, Wholistic.art
Tambra Raye Stevenson, Founder and CEO, WANDA: Women Advancing Nutrition Dietetics and Agriculture

12:20–1:20 p.m. **LUNCH**

AFTERNOON WORKSHOPS

Afternoon sessions will not be recorded.

1:30–2:45 p.m. **CONCURRENT SESSIONS**

Documenting Your Waterways

ROOM A

This workshop will introduce participants to the many ways that life throughout the Anacostia watershed has been and can continue to be documented. It will also address the stewardship, sense of place, and staying power such documentation provides in the face of rediscovery and redevelopment of the river and its environs.

WORKSHOP LEADERS

Tracy Perkins, Assistant Professor, Department of Sociology and Criminology, Howard University
Gabrielle Roffe, Project and Partnership Coordinator, Chesapeake Conservancy

Climate Justice East of the Anacostia: Communities Prepared

ROOM B

This workshop will engage residents in several specific challenges that communities east of the Anacostia face due to the impacts of climate change. It will also identify the historical roots of those challenges as well as the resources and next steps available to groups and individuals as they address these critical issues.

WORKSHOP LEADER

Marissa Ramirez, Community Climate Strategy Manager, Healthy People & Thriving Communities, Natural Resources Defense Council

2:55–4:10 p.m. **CONCURRENT SESSIONS**

Women's Environmental Leadership Summit

1 DAY

continued

ALL SESSIONS TAKE PLACE IN THE NEWS CONFERENCE ROOM EXCEPT AS NOTED.

Self-Care and Environmental Advocacy

ROOM A

This workshop will help make participants aware of the emotional and physical costs inherent in advocacy, including challenges that face communities (defined in the broadest sense) in the areas of health, equity, and access. Attendees will explore the variety of tools and resources available to ensure their continued health as they move forward in their efforts.

WORKSHOP LEADERS

Alaura Carter, Grassroots Program Coordinator, Climate Speakers Network, The Climate Reality Project

Knowing your Worth: A Practical Application

ROOM B

This workshop serves as a practical application of the discussions from the morning session *Knowing Your Worth*. Participants will develop personal action plans, as they embark on the next steps of their education, career, and/or advocacy.

WORKSHOP LEADERS

Adrienne Hollis, Lead Climate Justice Analyst, Union of Concerned Scientists
Vernice Miller-Travis, Senior Advisor for Environmental Justice and Equitable Development, Skeo Solutions

4:15–5:00 p.m. **REPORT OUTS**

Session will be recorded.

5:00–6:00 p.m. **RECEPTION** **State Dining Room**

DAY 2

SATURDAY, SEPTEMBER 14, 2019

8:00–8:40 a.m.	**Registration & Continental Breakfast**	News Conference Room Hallway
8:45–8:55 a.m.	**Welcoming Remarks**	News Conference Room

MORNING PANEL DISCUSSIONS

Morning sessions will be recorded.

9:00–10:30 a.m. **CONCURRENT SESSIONS**

Cultural Practice as Environmental Activism

ROOM A

Discussion will highlight cultural practice as a form of environmental activism inherent in communities' understanding of their place within the natural world. Panelists will provide examples of how daily life serves as a function of stewardship.

MODERATOR

Pavithra Vasudevan, Assistant Professor, Department of African and African Diaspora Studies, Center for Women's and Gender Studies, The University of Texas at Austin

PANELISTS

Beth Collier, Founder and Director, Wild in the City
Mei Ling Isaacs, Community Cultural Health Planner, 'Ahahui Mālama I Ka Lōkahi (AML)
Monique Verdin, Director, The Land Memory Bank & Seed Exchange

Translating the Science: Research and Real-World Applications

ROOM B

Discussion will explore the challenges and necessity of research that moves beyond the boundaries of academia and organizations to engage the communities whose lives it most reflects and impacts. Panelists will discuss the role service plays in efforts to make their work relatable to the everyday experiences of a variety of stakeholders.

MODERATOR

Alicia Race, Campaign Coordinator, Union of Concerned Scientists

PANELISTS

Nicole Hernández Hammer, Project Director, Clean Energy States Alliance
Shizuka Hsieh, Associate Professor of Chemistry, Trinity Washington University
Caroline Solomon, Professor of Biology, Gallaudet University

Women's Environmental Leadership Summit

2 DAY

continued

ALL SESSIONS TAKE PLACE IN THE NEWS CONFERENCE ROOMS EXCEPT AS NOTED.

10:40 a.m.–12:10 p.m. **CONCURRENT SESSIONS**

Faith Communities and Environmental Advocacy

ROOM A

Representatives of several faith communities will explore the role of stewardship in the teachings of their faith, how they have applied such teachings to their spiritual practice, and the forms environmental advocacy has taken in their communities.

MODERATOR **Shantha Ready Alonso**, Executive Director, Creation Justice Ministries

PANELISTS
Nana Firman, Muslim Outreach Director, GreenFaith
Dianne Glave, Coordinator of Diversity Development and Inclusion, Western Pennsylvania Conference of the United Methodist Church
Dottie Yunger, Pastor, Solomons United Methodist Church

The Environmentalists in Your Neighborhood

ROOM B

This panel will introduce attendees to several environmental leaders actively advocating for the Anacostia watershed and its communities. Discussion will explore the personal paths taken to their current work, their various approaches to advocacy, the issues they feel are the most critical to the Anacostia watershed and its people, and steps moving forward.

MODERATOR **Kari Fulton**, Organizer, Writer, Historian

PANELISTS
Akiima Price, Creative Thinker and Doer
Brenda Richardson, President, Chozen Consulting, LLC
Ruby Stemmle, Founder and CEO, ecoLatinos

12:20–1:20 p.m. **LUNCH**

AFTERNOON WORKSHOPS

Afternoon sessions will not be recorded.

1:30–2:45 p.m. **CONCURRENT SESSIONS**

You Are What You Eat: Food Justice and Health Justice in DC

ROOM A

This workshop will examine intersections of food justice and public health by exploring two issues

of critical concern in DC communities. Attendees will develop best practices for the engagement of an impacted group.

WORKSHOP LEADER **Franciel Ikeji**, Nutrition Educator

Youth Engagement Along the Anacostia

ROOM B

This workshop will introduce participants to best practices that reflect the intersections of mental health, youth engagement, and environmental stewardship.

WORKSHOP LEADER **Akiima Price**, Creative Thinker and Doer

2:55–4:10 p.m. **CONCURRENT SESSIONS**

Applying Civil Rights Law to Environmental Justice Issues

ROOM A

This workshop will provide participants with a civil rights framework through which to understand and address issues of access and equity along the Anacostia River.

WORKSHOP LEADER **Daria Neal**, Attorney

Shaping Your Path: Career & Educational Opportunities in Environmental Studies

ROOM B

This workshop will introduce participants to the various educational and internship opportunities in the field of environmental studies in the DC metropolitan area. Attendees will develop a list of tools to determine which programs are the best fit for their next steps in environmental studi

WORKSHOP LEADER **Eboni Preston**, Director of Programs, Greening Youth Foundation

4:15–5:00 p.m. **REPORT OUTS**

Session will be recorded.

5:00–6:00 p.m. **NETWORKING EVENT** **State Dining Room**

PANELIST AND WORKSHOP LEADER BIOGRAPHIES

Shantha Ready Alonso

Executive Director, Creation Justice Ministries

Shantha Alonso has served as executive director of Creation Justice Ministries since 2015, prioritizing racial-ethnic equity as a driving force for protecting, restoring, and, more rightly, sharing God's creation. Ms. Alonso's writing has appeared in *The Hill,* the *Colorado Gazette, The Day, Sojourners, Patheos,* and *Justice Unbound*. She has also been interviewed by NPR, Religion News Service, *U.S. Catholic*, and various podcasts. Ms. Alonso has arranged countless stakeholder meetings between people of faith and policymakers. She has testified before the U.S. Environmental Protection Agency, the U.S. Department of Interior, and the White House Office of Management and Budget.

Ms. Alonso is listed among the 2018 "Grist 50 Fixers." She is a contributing author to *For Such a Time as This: Young Adults on the Future of the Church* and *A Child Laughs: Prayers of Justice and Hope*. She is editor of the anthology *Towards a Global Christian Movement for Eco-Justice: Young Voices from North America*.

Prior to her time at Creation Justice Ministries, Ms. Alonso worked with the People Improving Communities through Organizing (PICO) network (now known as Faith in Action), the Gamaliel Foundation, and the National Council of Churches USA. She also served as vice chair of the World Student Christian Federation. Ms. Alonso earned master's degrees in social work and pastoral studies from Washington University in St. Louis and Eden Theological Seminary, respectively. She did her undergraduate work at the University of Notre Dame.

C. Anneta Arno

Director, Office of Health & Equity, DC Health

C. Anneta Arno is an experienced public health professional with a track record in the field of health equity. This includes recognition for work promoting community collaboration to transform views and perspectives related to root causes of health disparities, the integration of health equity concepts into healthcare delivery systems, and racial equity through a public health lens.

Immediately prior to joining the team at DC Health, Dr. Arno served as the division manager for Communicable Disease Prevention & Public Health Preparedness in the Kansas City, MO, Department of Health. From 2011 to early 2015, she served as director of the Center for Health Equity at Louisville Metro Department of Public Health and Wellness, and as adjunct faculty at the University of Louisville, School of Public Health and Information Sciences. Dr. Arno holds a PhD in urban planning from the University of Reading, Berkshire, England, and an MPH in healthcare administration from Columbia University.

Dr. Arno's diverse career experiences in public health, philanthropy, urban planning, and academia, as well as her spirit of collaboration, are leveraged in her leadership of DC Health's Office of Health Equity (OHE) and service as a critical ambassador for a "health in all policies" approach to improving population health and achieving health equity. She is especially proud of her achievements to date since launching OHE in 2015, including convening the Safer Stronger Advisory Committee (Final Report, 2016); the Buzzard Point Community Health & Safety Study (2016); three cohorts of Healing Futures Fellowship (2016, 2017, 2018); launch of the Mayor's Commission on Health Equity (2017); and, most recently, publication of the inaugural *Health Equity Report: District of Columbia 2018* (February 2019).

Alaura Carter

Grassroots Program Coordinator, The Climate Reality Project

Alaura Carter is a Washington, DC, native who believes you should "warm her heart, not her planet." She started organizing in 2009 as a student at Florida A&M University, where she earned her bachelor's degree in public relations with a minor in environmental science in 2012. Ms. Carter believes in the outsourcing of environmental ideas, issues, and solutions and has had the opportunity to work for several non-profits in environmental advocacy, communications, and educational roles.

At The Climate Reality Project, she serves as the grassroots program coordinator for the Climate Speakers Network. In this role she works with communities throughout the U.S. to educate on environmental justice and climate change issues and solutions. Her interest in the natural wonders of the planet developed into a strong passion for environmental justice and climate change education. When trying not to be Captain Planet, she enjoys shopping, live music, watching court shows, and learning more about earth science.

Beth Collier

Founder and Director, Wild in the City

Beth Collier is a nature-based psychotherapist and anthropologist who teaches natural history and woodland living skills in the United Kingdom. Her work explores relationships with people and with nature. As a therapist, Ms. Collier works exclusively in natural settings. She has spent many years theorizing our relationships with nature from an applied psychotherapeutic perspective, developing nature-based psychotherapy as an orientation of practice for ongoing client work. She is currently writing *Nature-based Psychotherapy: Exploring Relationships with Ourselves, Others and Nature* (Routledge). Ms. Collier provides professional training for psychotherapists and allied professionals on the therapeutic use of nature through the Nature Therapy School.

Ms. Collier is the founder and director of Wild in the City, an organization supporting the well-being of urban residents by offering experiences in bushcraft, natural history, and ecotherapy using the skills of our ancestors to nurture a deeper connection with the natural world.

Ms. Collier has a particular interest in supporting people of color in finding their place in natural settings and creates opportunities for the representation of Black leadership in nature. Her work has produced ethnographies of our intimate, emotional relationships with nature, including the ethnography of disconnection and its impact on the development of cultural attitudes which shun nature; experiences of people of color in nature in UK settings; and white attitudes to Black presence in nature.

Ms. Collier regularly speaks at conferences and seminars on nature and well-being from psychotherapeutic and anthropological perspectives. She is a trustee of the UK's National Park City Foundation, a role in which she leads work on nature, health, and cities. The Foundation launched London as the world's first National Park City in summer 2019. Ms. Collier previously worked in the human rights field for 15 years. She was commissioned by the UN Refugee Agency (UNHCR) as an international expert on gender-based persecution and ran a research consultancy documenting conditions in refugee-producing countries.

Panelist and Workshop Leader Biographies
continued

Susana De Anda

Executive Director and Co-Founder, Community Water Center

Susana De Anda is the executive director and co-founder of the Community Water Center, a non-profit environmental justice organization based in California's San Joaquin Valley, whose mission is to act as a catalyst for community-driven water solutions through organizing, education, and advocacy. A seasoned community organizer, Ms. De Anda has received numerous awards and recognitions including the James Irvine Foundation Leadership Award (2018), Latino Community Foundation Leading Change Award (2018), White House Champion of Change for Climate Equity (2016), Mark Dubois Award from Friends of the River (2014), "150 Fearless Women in the World" by *Newsweek* (2012), and "Women on Top—Top Activist" by *Marie Claire* (2012).

Ms. De Anda's experience includes planning and organizing positions at the Center on Race, Poverty and the Environment, the County of Merced Planning Department, the Santa Barbara County Water Agency, and the Santa Barbara non-profit Community Environmental Council. She served for the past few years on the community funding board of the Grassroots Fund through the Rose Foundation for Communities and the Environment, the Tulare County Water Commission, and the board of directors of the Tulare County United Way. She currently serves on the advisory council for the Water Solutions Network and is a steering committee member on the Water Equity and Climate Resilience Caucus. Ms. De Anda is also a co-founder of the board of Water Education for Latino Leaders (WELL). Ms. De Anda earned a BA from the University of California, Santa Barbara, while completing a double major in environmental studies and geography.

Katherine T. Egland

Chair, NAACP National Board of Directors' Environmental and Climate Justice Committee

As chair of the NAACP National Board of Directors' Environmental and Climate Justice Committee, Katherine T. "Kathy" Egland provides governance and oversight of its widely circulated policy positions, reports, publications, and toolkits. Ms. Egland has advanced the NAACP's Environmental and Climate Justice strategic agenda from its moral, human rights, social justice, and equity perspective through interviews, trainings, op-eds, lectures, etc., on the national and international levels.

Ms. Egland has a lifetime of advocacy involvement in social justice, human, civil, and women's rights. As a resident of Gulfport, MS, she is a survivor of one of the worst climate disasters in American history, Hurricane Katrina in 2005; and one of the worst man-made environmental disasters, the BP Deepwater Horizon Gulf Oil Spill, which contaminated the Mississippi Gulf Coast waters in 2010, located less than a quarter mile from her home. She was involved in an NAACP Coal Blooded Campaign to shut down a coal plant located less than four miles from her home. The campaign ended with a landmark Sierra Club settlement that ceased the company's coal-burning operation in 2015.

Caroline Farrell

Executive Director, Center on Race, Poverty & the Environment (CRPE)

Caroline Farrell is the executive director of the Center on Race, Poverty & the Environment (CRPE) based in Delano, CA. Since 1999, Ms. Farrell has represented low-income communities and communities of color in the San Joaquin Valley on land-use issues related to dairy development, hazardous waste facilities, ethanol plant siting, and long-range community planning. She sits on the board of directors for Communities for a Better Environment, the Planning and Conservation League, and Act for Women and Girls.

Ms. Farrell was appointed to the AB32 Environmental Justice Advisory Committee to the California Air Resources Board in 2008 and served until 2010. She co-authored, with Luke Cole, "Structural Racism, Structural Pollution and the Need for a New Paradigm" for the *Washington University Journal of Law & Policy*. She authored "SB 115: California's Response to Environmental Justice-Process over Substance" for the *Golden Gate Environmental Law Journal*, "A Just Transition: Lessons Learned from the Environmental Justice Movement" for the Duke Forum for Law & Social Change, and "Markets Alone Can't Produce Social Justice" for the Environmental Law Institute's Debate on the Morality of Market Mechanisms.

Ms. Farrell graduated from Golden Gate University School of Law with highest honors. She received her BA in political science from Bates College in Lewiston, ME.

Leslie G. Fields

Director, Environmental Justice and Community Partnerships, Sierra Club

Leslie Fields brings over 20 years of federal, state, local, and international environmental justice and environmental law and policy experience to the Sierra Club. Ms. Fields was appointed by President Barack Obama to serve on the board of directors of the Mickey Leland Urban Air Toxics Research Center. She serves on the boards of the Children's Environmental Health Network and Empower DC. She also serves on the board of Adeso African Solutions (formerly Horn Relief, an East African natural resources and development organization) and has been an adjunct law professor at Howard University School of Law. Ms. Fields is a graduate of Cornell University and the Georgetown University Law Center.

Nana Firman

Muslim Outreach Director, GreenFaith

Nana Firman's involvement in encouraging the American Muslim community to practice an eco-lifestyle prompted her to initiate the Green Mosque Project for the Islamic Society of North America. She previously worked with the World Wildlife Fund in Indonesia, directing the green recovery efforts in the wake of the 2018 earthquake and tsunami, and also engaged with Muslim leaders to create climate-resiliency plans. She organized the Islamic Declaration on Global Climate Change and later co-founded the Global Muslim Climate Network, which calls on all Muslim nations to transition from fossil-fuel to clean-energy-based development. Ms. Firman was named a White House Champion of Change for Climate Faith Leaders by President Barack Obama.

Panelist and Workshop Leader Biographies
continued

Kari Fulton
Organizer, Writer, Historian

Kari Fulton is an award-winning environmental and climate justice organizer, writer, and historian. She has worked with various domestic and global coalitions to coordinate campaigns and national conferences, including Power Shift (the largest youth climate summits in the United States) and the 2017 People's Climate March. Ms. Fulton has trained and engaged students and communities on climate and environmental justice across the United States. She has traveled to Europe, Latin America, and South Africa, attending and reporting on international environmental conferences. Ms. Fulton supports local community organizations as they develop strategies for stronger public health, community empowerment, and environmental policies. Ms. Fulton also has over five years of experience as a professional tour guide of Washington, DC, and has developed community and theme-based tours for corporations, universities, and community organizations. Her work has been featured in various media, including Black Entertainment Television (BET), *Teen Vogue*, *Essence*, and Chinese Cable Television America (CCTV). Ms. Fulton is also a mother, bike enthusiast, and a graduate of Howard University. www.checktheweather.net

Dianne Glave
Coordinator of Diversity Development and Inclusion, Western Pennsylvania Conference of the United Methodist Church

Dianne Glave has a PhD in U.S. social history with an emphasis on African American and environmental history. Her publications include *Rooted in the Earth: Reclaiming the African American Environmental Heritage* and *To Love the Wind and the Rain: African Americans and Environmental History*. Her forthcoming book is *Black Eco-theology Through History: The African American Experience* (Routledge).

Dr. Glave is currently the coordinator of diversity development and inclusion in the Western Pennsylvania Conference of the United Methodist Church. She is also a part-time lecturer at Pittsburgh Theological Seminary and in the history department at Carnegie Mellon University. She has taught many classes, including African American history, the history of African American women, and African American environmental history. Previous to these positions, she served as a local pastor at Crafton United Methodist Church and Ingomar Church, both in Pittsburgh.

Rhonda Hamilton
Advisory Neighborhood Commissioner and Advocate

Rhonda Hamilton received her master's degree in public administration from Southeastern University in Washington, DC, and a bachelor's degree in psychology from the University of the District of Columbia. She works as a community outreach coordinator and patient navigator at Georgetown University's Office of Minority Health and Health Disparities Research. She was raised in Southwest Washington, DC, and has spent the past 14 years working in her Ward 6 community to help residents as an advisory neighborhood commissioner.

Ms. Hamilton is also the president of Syphax Gardens Resident Council, a public housing property, and co-founder of the Near Buzzard's Point Resilient Action Committee (NeRAC). She actively advocates on behalf of residents, especially those who are low- to moderate-income, to address the environmental issues that have negatively impacted them. She has been working to make sure their health concerns and vital needs are not overlooked during the massive amount of redevelopment taking place in Southwest DC. Ms. Hamilton is determined to bring the environmental justice concerns of her community to the fore so that residents do not continue to suffer in silence from the ill health effects resulting from their exposure to contaminates from Buzzard Point, a massive brownfield site with cement-mixing facilities now under redevelopment.

Nicole Hernández Hammer

Project Director, Clean Energy States Alliance

Nicole Hernández Hammer works on low- and moderate-income solar for the Clean Energy States Alliance. She is a climate change expert, sea level rise researcher, and environmental justice advocate.

A Guatemalan immigrant, Ms. Hernández Hammer has worked to address the disproportionate impacts of climate change on under-resourced communities across the United States. She served as the climate science and community advocate at the Union of Concerned Scientists, as the Florida field manager for Moms Clean Air Force, and as an environmental blogger for Latina Lista. Before that, she was the assistant director of the Florida Center for Environmental Studies at Florida Atlantic University and coordinated the Florida Climate Institute's state university consortium. She co-authored a series of technical papers on sea level rise projections, impacts, and preparedness. Her research contributed to the 2014 National Climate Assessment. Her environmental justice activism and initiative on climate change earned her an invitation from First Lady Michelle Obama to be her special guest at the 2015 State of the Union address. She also testified at the 2016 Democratic Party platform hearings.

Ms. Hernández Hammer speaks across the country on climate change and environmental justice issues. Most recently, she presented at the National Hispanic Medical Association Conference and the MIT Cambridge Science Festival. She has done extensive media work and has been featured in National Geographic's *The Years of Living Dangerously*, Amy Poehler's Smart Girls, the *New Yorker*, MSNBC, the *Miami Herald*, Telemundo News, Univision.com, the *Huffington Post*, PRI's *Science Friday*, the *New York Times*, the *Washington Post*, Grist, NPR, and other major news outlets.

Panelist and Workshop Leader Biographies
continued

Elgloria Harrison

Associate Dean, College of Agriculture, Sustainability and Environmental Sciences, University of the District of Columbia

Elgloria Harrison is responsible for promoting climate change research initiatives at UDC's CAUSES program. Dr. Harrison teaches courses in the interdisciplinary general education, urban sustainability, and the professional science master's curriculum, with a focus on urban sustainability and the intersection of climate change and human health. Dr. Harrison's recent research interest is determining the perception of climate change, air pollution, and the impact on human health on Washington, DC, residents. She holds a doctor of management in leadership, an MS in health care administration, and a BS in biology.

Adrienne Hollis

Lead Climate Justice Analyst, Union of Concerned Scientists

At the Union of Concerned Scientists, Adrienne Hollis leads the development, design, and implementation of methods for accessing and documenting the health impacts of climate change on communities of color and other traditionally disenfranchised groups. Dr. Hollis works with environmental justice communities to identify priority health concerns related to climate change and other environmental assaults and evaluates climate and energy policy approaches for their ability to effectively address climate change and benefit underserved communities. She develops and implements projects to document health impacts of climate change on communities of color and ensures scientific information from UCS is communicated in a culturally competent and helpful manner to vulnerable populations. As a part of its climate and energy group, she is developing and scoping a new research agenda and strategy on climate and health; evaluating climate and energy policies aimed at reducing exposure to negative health and environmental impacts; and recommending policy approaches to foster inclusiveness and its greater benefits to underserved communities and effectively address climate change.

Dr. Hollis has more than 20 years of extensive experience in the environmental arena as an associate professor in public health, environmental toxicologist, and environmental attorney. Her work is particularly focused on environmental justice, equity, and inclusion and the adverse health effects of environmental exposures and climate change on vulnerable communities. She is a member of numerous organizations and boards, including the EPA's Clean Air Act Advisory Committee, the National Adaptation Forum's steering committee (co-chair) and its equity working group, the American Public Health Association's environment section and environmental justice subcommittee, the Endangered Species Coalition (vice chair and co-general counsel), and the Green Leadership Trust.

Prior to joining UCS, Dr. Hollis served as the director of federal policy at WE ACT for Environmental Justice and taught at the George Washington University Milken School of Public Health and American University's Washington College of Law.

Dr. Hollis earned a BS in biology from Jackson State University, a PhD in biomedical sciences from Meharry Medical College, and a JD from Rutgers University School of Law. She completed postdoctoral studies at Harvard T.H. Chan School of Public Health.

Shizuka Hsieh

Associate Professor of Chemistry, Trinity Washington University

Shizuka (Zukes) Hsieh teaches in Trinity Washington University's College of Arts and Sciences (Trinity's historic liberal arts women's college). Her research focus is air-quality monitoring for communities disproportionately burdened by pollution. She has collaborated with the Ivy City and Near Buzzard Point neighborhoods in Washington, DC, and has presented findings at the National Environmental Justice Conference, the American Geophysical Union, and to DC officials. Her background in environmental justice comes from a 2009–2010 AAAS Science and Technology and Policy Fellowship at the U.S. EPA Office of Solid Waste and Emergency Response.

Previously, Dr. Hsieh was associate professor of chemistry at Smith College and a Henry Dreyfus Teacher-Scholar. At Smith, she mentored 26 undergraduate researchers, half of whom were co-authors in laser spectroscopy and molecular reaction dynamics. She has taught courses in environmental chemistry and pollution with the Associated Kyoto Program in Japan and at Oberlin College. Dr. Hsieh attended Oxford as a Marshall Scholar and holds a DPhil in physical chemistry. She earned her BA in chemistry from Carleton College.

Franciel Ikeji

Nutrition Educator

Franciel Ikeji is an experienced nutrition educator and has worked with all ages from pre-kindergarten to older adults in community and academic settings. Currently, she works in child nutrition programs to support infrastructures with the goal of improving children's lifelong eating and physical activity habits. Ms. Ikeji also works on materials to promote and encourage participation in local school wellness policies and sustaining healthy school environments.

As a founding board member of WANDA: Women Advancing Nutrition Dietetics and Agriculture, she is passionate about the mission to grow a new crop of "food sheroes" from farming, to health in Africa and the Diaspora, to empowering communities. Through education, advocacy, and innovation, she believes we can reclaim our healing food wisdom, restore our health, and return to the strong roots of our heritage.

Ms. Ikeji received her MS from Tufts University, Friedman School of Nutrition Science and Policy, RD from Tufts Medical Center-Frances Stern Nutrition Center, and BS in food science and technology and BS in nutritional sciences from Texas A&M University.

Mei Ling Isaacs

Community Cultural Health Planner, 'Ahahui Mālama I Ka Lōkahi (AML)

Mei Ling Isaacs is the community cultural health planner for 'Ahahui Mālama I Ka Lōakahi (AML) a community-based, Native Hawaiian restoration and conservation organization located in Hawai'i, on Oahu Island. Its mission is to "practice, promote, and perpetuate a modern native Hawaiian conservation ethic." Its vision is a "healthy Hawaiian ecosystem nurtured by human communities and serving as a model for local and global resource management." Kawainui and its wetlands are a keystone of AML's work, as it is a critical at-risk habitat for many native and threatened life

forms that live there. Most important, Kawainui is ancestral land where Kanaka Maoli (Hawaiian) thrived for hundreds of years prior to European contact. Like the continually gentrifying community of Kawainui, Kanaka Maoli are also at risk.

Prior to AML, Ms. Isaacs administered the institutional review board for Papa Ola Lokahi, the Native Hawaiian Health Care Board, for 10 years and was the executive director of the Native Hawaiian Health Care System for Maui for eight years. Her current position creates opportunities for Hawaiian communities to reconnect with their culture through caring for their precious ancestral land by melding the values and beliefs of ancient Hawaiian culture with that of contemporary science. Her life's work is dedicated to social justice for not only Native Hawaiians but for all people.

AML has assigned Ms. Isaacs to its innovative initiative, *Mahina meets Haumea (Hawaiian female deities)*, which seeks to elevate the lives of women prisoners transitioning from prison into the community by building partnerships among other women. It also aims to reconnect them with their ancestral lands as a place of mutual healing and restoration, as well as a life-long safe place where they can sustain deeply-rooted cultural identity in a healing, mentoring format.

Vernice Miller-Travis
Senior Advisor for Environmental Justice and Equitable Development, Skeo Solutions

Vernice Miller-Travis has over 30 years of experience in environmental and civil rights policy development and is sought after for her expertise in cross-cultural and environmental conflict mediation and facilitation, multi-stakeholder design and planning, environmental justice, equitable development, brownfields redevelopment, urban river restoration, and community revitalization. Ms. Miller-Travis's interests have focused on environmental restoration and the inclusion of low-income, people of color, and indigenous communities in environmental decision making at the federal, state, local, and tribal levels.

Prior to joining Skeo Solutions, Ms. Miller-Travis served as director of the Environmental Justice Initiative of the Natural Resources Defense Council, program officer at the Ford Foundation, executive director of Groundwork USA, and co-founder of WE ACT for Environmental Justice. She also serves on the board of directors of Clean Water Action, the North Carolina Land Loss Prevention Project, the Patuxent Riverkeeper, WE ACT for Environmental Justice, and the Smithsonian Anacostia Community Museum.

Irma R. Muñoz
Founder and President, Mujeres de la Tierra

Irma R. Muñoz is the founder and president of Mujeres de la Tierra, an environmental equity non-profit focused on healing *La Madre Tierra* and re-defining the traditional "green" dialogue in Los Angeles. Ms. Muñoz firmly believes in the power of one and that community action starts with individual participation. She believes that the families and residents of the neighborhood should have the power and right to lead/own their issues and determine what's best for them, their families, and their community.

She currently serves on the Santa Monica Mountains Conservancy board of directors as an appointee of the mayor of Los Angeles and is a governor's appointee to the Los Angeles County Regional Water Quality Control Board; she currently serves as chair of both. She has held many positions in the public sector. The position she is most proud of is her presidential appointment to the U.S. Small Business Administration in Washington, DC, during the Clinton Administration. Ms. Muñoz earned her BA from the University of California, San Diego, and her JD from the Thomas Jefferson School of Law in San Diego.

Daria Neal
Attorney

Daria Neal supervises a team of attorneys who work with federal agencies to ensure consistent and effective enforcement of civil rights statutes and executive orders that prohibit discrimination in federally conducted and assisted programs and activities, including Title VI of the Civil Rights Act of 1964. Additionally, Ms. Neal represents her division on the Federal Interagency Working Group on Environmental Justice, which was created by Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.

Ms. Neal currently serves as an adjunct professor at Howard University School of Law teaching seminar courses on environmental justice and on civil rights and the environment. Ms. Neal has published several articles and essays, including "Healthy Schools: A Major Front in the Fight for Environmental Justice" (38 *Environmental Law* 473, 2008) and "Recent Developments in Federal Implementation of Executive Order 12,898 and Title VI of the Civil Rights Act of 1964" (57 *Howard Law Journal* 941, 2014).

She previously served as senior counsel for the Environmental Justice Project at the Lawyers' Committee for Civil Rights Under Law and as a litigation associate for the firm Jackson Lewis, P.C. Ms. Neal is a proud graduate of Hampton University and received her law degree from the UCLA School of Law.

Jeaninne Kayembe Oro
Wholistic.art

Jeannine Kayembe Oro aka (_Oro5_) is a Filipino and Congolese queer-identified woman. In 2010, at age 19, she and 30 other young people along with native North Philadelphia teens co-founded Urban Creators and Life Do Grow urban farm, which became a food, arts, and culture hub in North Philadelphia. Ten years later and after helping raise $1 million for the organization, she's expanding mediums and making an impact on climate change and racial justice through naturistic soundscapes. As a member of Wholistic.art, she is exploring art as a central tool for movement building, blending sights and sounds from nature, hip hop, and revolutionary women of color to create soundtracks folx can heal, hike, and rage to. It's her belief that once the environment is safe for Black/Brown women/trans people, it will be safe for all.

Mamie A. Parker

President, Ma Parker and Associates

Mamie A. Parker, an executive coach and facilitator in the Washington, DC, area, was inspired by her mother, a maid and sharecropper, along with one of the hit songs by the legendary singer/songwriter Marvin Gaye, to help others and promote clean water and air. At an early age, Dr. Parker's mother took her fishing and shared life lessons that really helped her when she was the first to integrate her segregated elementary school in Arkansas and become the first African American female chief of staff at the U.S. Fish and Wildlife Service.

Dr. Parker has worked as a fish and wildlife biologist and executive in Wisconsin, Minnesota, Missouri, Georgia, Massachusetts, and Washington, DC. She started her career at a Wisconsin fish lab and hatchery and has extensive experience in Clean Water Act permits, ESA, NEPA compliance, NRDA contaminants clean-up projects, invasive species, fish passage, and Farm Bill wetland restoration activities. The governor of Arkansas enshrined her into the Arkansas Outdoor Hall of Fame, honoring her as the first Arkansan to serve as the head of fisheries in this country. As a Senior Executive Service career employee, the president of the United States awarded her the Presidential Rank Award for her work on building powerful partnerships for the National Fish Habitat Plan, the Partners for Fish and Wildlife Program, and with organizations such as the American Pharmaceutical Association and Walmart, where she promoted a national campaign of smart disposal of medicine and unwanted aquarium fish and plants. The Kellogg Foundation awarded her and the Green Schools Alliance a grant to organize workshops and share the Ma Parker Journey, her life story as a pioneer in conservation, touching the lives of many minority students throughout the world.

Dr. Parker's work has been featured on NPR's *Morning Edition* and on the *Steve Harvey Show*, and in Dudley Edmundson's *The Black and Brown Faces in America's Wild Places*. Dr. Parker was awarded the American Fisheries Society's Emmaline Moore Award for personally mentoring over 50 women and people of color in her profession and is a co-author of its book *The Future of Fisheries*.

She is an avid angler and spends her time working in the community as a member of the American Fisheries Society, Alpha Kappa Alpha Sorority, Inc., the Links, Inc., and the Rotary Club of Dunn-Loring.

The governor of Virginia appointed her as a commissioner for the Virginia Game and Inland Fisheries Board where she was recently elected vice chair. Dr. Parker also serves on the board of directors of Duke University Nicholas School of the Environment, Northland College, American University School of Public Affairs, The Nature Conservancy—Virginia Chapter, Student Conservation Association, Ducks Unlimited Conservation Policy Advisory Council, Brown Advisory Sustainable Investment, Marstel-Day Consulting Company, Defenders of Wildlife, Potomac Conservancy, and Chesapeake Conservancy. Former Secretary of State Madeleine Albright and the Council of World Women Leaders awarded her an Aspen Institute Fellowship, enabling her to work at the Oprah Winfrey Leadership Academy, in the Kingdom of Lesotho, and in Johannesburg and Cape Town, South Africa.

Tracy Perkins

Assistant Professor, Department of Sociology and Criminology, Howard University

Tracy Perkins specializes in social inequality, social movements, and the environment through a focus on environmental justice activism. Her book-in-progress, *Movement Matters: Protest, Policy and Three Decades of Environmental Justice Activism*, examines the political evolution of the California environmental justice movement from the 1980s to the mid-2010s. Her previous research focused on women's pathways into environmental justice activism in California's San Joaquin Valley. Dr. Perkins has a BA in development studies from the University of California, Berkeley, an MS in community development from the University of California, Davis, and a PhD in sociology from the University of California, Santa Cruz.

A significant part of Dr. Perkins's work includes documenting environmental justice activism. She does this with oral history, photography, a news feed/archive, and the creation of community and digital archives. These forms of documentation are then shared online, in libraries, or with teachers. She sometimes pairs such documentation with participatory theater, photo exhibits, original writing, and suggestions for how college teachers can use the materials in their classrooms. Examples include *Voices from the Valley: Environmental Justice in California's San Joaquin Valley*, *In Her Own Words: Remembering Teresa de Anda, Pesticides Activist (1959–2014)*, the Buzzard Point Oral History Project in Washington, DC, and a project-in-development to create a digital archive and multi-media storytelling website on a 1990s-era anti-nuclear waste landfill campaign along the lower Colorado River. tracyperkins.org

Eboni Preston

Director of Programs, Greening Youth Foundation

Eboni Preston is a management professional with a passion and commitment to social, economic, and educational justice. At the Greening Youth Foundation she oversees the organization's Public School Initiative, Youth Conservation Corps, and Urban Youth Corps departments, including national programs and initiatives in partnership with the U.S. Department of Interior, U.S. Department of Agriculture, and local municipalities. As a member of the leadership team, she is passionate about her work to nurture the next generation of environmental stewards and leaders.

Ms. Preston came to the Greening Youth Foundation in 2016 after years of extensive work with the NAACP, National Urban League, and Children's Aid Society. She has a background in non-profit administration, program operations, data management, program evaluation, and workforce development. Ms. Preston holds an MS in social work from Columbia University, a master of public administration from Kennesaw State University, and a BA from Duke University.

Panelist and Workshop Leader Biographies
continued

Akiima Price
Creative Thinker and Doer

Akiima Price links people, places, and programs with stressed, underserved communities. A Washington, DC, native, Ms. Price is a nationally respected thought leader at the intersection of social and environmental issues and the relationship between nature and community well-being. Her innovative programming strategies feature nature as a powerful medium to connect youth, adults, and families in meaningful, positive experiences that affect the way they feel about themselves, their communities, and their parks. From her early career experiences as a National Park Service interpretation ranger at Lake Mead National Recreation Area in Boulder City, NV, to her national work with environmental and social service organizations, Ms. Price has cultivated over 25 years of experience into cutting-edge best practices in trauma-informed environmentalism.

Ms. Price is currently contracted with the National Park Foundation, charged with developing strategies to strengthen Anacostia Park's programming and external relationships as a critical part of a broader effort to build an innovative friends group between the park and the highly stressed surrounding community.

Alicia Race
Campaign Coordinator, Union of Concerned Scientists

At the Union of Concerned Scientists, Alicia Race works closely with activists, experts, and coalition partners to advance national and state-based climate initiatives. She recently participated in a project with rural communities on the Eastern Shore of Maryland to address current and future impacts of sea level rise. Prior to joining UCS, Ms. Race worked as a community choice energy coordinator for the Climate Action Campaign, where she gave presentations and mobilized support for a citywide renewable energy program. Prior to that, she worked for FWD.us, an organization focused on immigration reform, as their Midwest director and Florida coalition coordinator. Ms. Race earned an MA in political science from the University of Illinois at Chicago and a BA in political science and Spanish from Northern Kentucky University.

Marissa Ramirez
Community Climate Strategy Manager, Healthy People & Thriving Communities, Natural Resources Defense Council

At the Natural Resources Defense Council in Washington, DC, Marissa Ramirez works with neighbors and local leaders primarily in underserved locations on revitalizing their communities by providing best practices and tools for a more equitable and sustainable future. Ms. Ramirez has a master's of environmental management from the Yale School of Forestry and Environmental Studies, where she focused on urban environmental economics. She also holds a BS in biology from Yale University. Previously, Ms. Ramirez was a science researcher and continues to bring her passion for human and urban health to her professional career.

Malini Ranganathan

Assistant Professor, School of International Service, American University

In addition to her teaching responsibilities, Malini Ranganathan is a faculty affiliate at American University's Antiracist Research & Policy Center and a faculty fellow in the Metropolitan Policy Center at AU's School of Public Affairs. A critical urban geographer by training, Dr. Ranganathan conducts research and focuses her teaching in urban environmental justice and political ecology, with an emphasis on the history and politics of water infrastructure and property regimes, critical race theory, and post-colonial/decolonial theory. Most recently, she has done research on the history of environmental racism and prospects for climate justice east of the Anacostia River in Ward 7's Kenilworth neighborhood.

Brenda Richardson

President, Chozen Consulting, LLC

Brenda Richardson is an eco-feminist who has been working on welfare reform, environmental justice, economic development, and health issues for the past 30 years. She currently serves as president of Chozen Consulting, LLC, which focuses on community engagement, facilitation, training, and government relations. She is the principal for "Women Like Us," an initiative that focuses on design thinking for women.

Formerly, Ms. Richardson was the deputy chief of staff for Councilmember Marion Barry. Ms. Richardson also served as the managing director of the Metropolitan Dialogue, a group of people of faith who met monthly for many years to discuss civic issues in DC. From 1995 to 1996, Ms. Richardson was the director of resident services for the DC Housing Authority, and prior to that was the executive director of the Anacostia/Congress Heights Partnership.

Ms. Richardson is a former board member of the Blue Alley Youth Orchestra and current chair of Georgetown University Hospital's Lombardi Cancer Center community advisory group. She is a former board member of A Greater Washington, Anacostia Watershed Society, and Congress Heights Main Streets as well as a trustee of the DC Public Library and DC Water. She has a BA in political science from the University of Michigan and a master's of social work from the University of Maryland, Baltimore.

Gabrielle Roffe

Project and Partnership Coordinator, Chesapeake Conservancy

At Chesapeake Conservancy, Gabrielle Roffe works closely with the National Park Service to promote stewardship in the Chesapeake Bay watershed. She also leads her organization's efforts on diversity, equity, inclusion, and justice. Prior to joining the Chesapeake Conservancy, Ms. Roffe worked with the U.S. Fish and Wildlife Service building urban partnerships and community engagement programs in Kansas City and Denver, as well as with the National Aquarium. Ms. Roffe has expertise in the areas of partnership and capacity building, community engagement, and creative place making through nature and art. She takes a multi-disciplinary approach to

environmental issues and community outreach, blending art and nature to create a sense of space and bring communities together. She has worked with communities to explore and express their connection to nature and their environment through a variety of storytelling mediums including murals, gardens, photovoice, and dance.

Ms. Roffe completed her MS in environmental science at Towson University and her BA at the University of Southern California. She has spent the past 10 years working with non-profits and government agencies to build non-traditional partnerships to connect more diverse audiences to nature and inspire stewardship for the future of the conservation community.

Caroline Solomon
Professor of Biology, Gallaudet University

Caroline Solomon, whose area of research is in aquatic ecology, is currently investigating how nutrient (especially nitrogen) dynamics influences the composition and role of the microbial community in the Anacostia River. Dr. Solomon is also a mentor for many deaf and hard-of-hearing (HoH) students in STEM. Dr. Solomon's contributions to deaf/HoH STEM education have revolutionized the community and have earned her teaching and education awards from the Association for the Sciences of Limnology and Oceanography, Gallaudet University, and NPR ("50 Great Teachers") as well as several features in prominent education media.

Ruby Stemmle
Founder and CEO, ecoLatinos

Under Ruby Stemmle's leadership, ecoLatinos, a non-profit organization connecting environmental organizations with the Latino community to accomplish a cleaner and greener Chesapeake watershed, is forging alliances that engage and empower Hispanic communities by fostering green stewardship and conservation action. Through collaborations with faith-based and grassroots organizations, ecoLatinos works to adopt public spaces to help restore them and increase individual and collective stewardship of *La Madre Tierra*. EcoLatinos organizes waterways and trail clean-ups, litter reduction and pollution mitigation campaigns, urban tree plantings and stewardship programs, as well as multi-cultural outreach events and bilingual conservation trainings. In partnerships with local governments and regional environmental organizations, ecoLatinos co-founded the Festival del Rio Anacostia at the Bladensburg Waterfront Park and the Naturally Latinos Conference at the Woodend Mansion in Chevy Chase, MD.

Ms. Stemmle has over 15 years of experience in government relations, public engagement, and inclusive outreach. Prior to ecoLatinos, she worked as executive director of the Maryland Governor's Commission on Hispanic Affairs, appointments advisor to the Maryland Governor's Appointments Office, and Hispanic liaison for Prince George's County and the Washington, DC, Mayor's Office on Latino Affairs. A native of Colombia, Ms. Stemmle has lived in Cheverly, MD, for 20 years with her husband, Jack, and their son, David.

Tambra Raye Stevenson

Founder and CEO, WANDA: Women Advancing Nutrition Dietetics and Agriculture

Based in Washington, DC, Tambra Raye Stevenson is the founder and CEO of WANDA: Women Advancing Nutrition Dietetics and Agriculture and author of the bilingual children's series, *Where's WANDA?*, inspiring girls to become food "sheroes" across Africa and the Diaspora. As a 2014 National Geographic Traveler of the Year, she focuses on reconnecting her food roots to improve health of her community. Appointed by Mayor Muriel Bowser to the DC Food Policy Council, Ms. Stevenson chairs the Food System and Nutrition Education working group. Her work has been highlighted by *Forbes*, the *Washington Post*, Voice of America, Food Tank, and *National Geographic Traveler* magazine. As a Les Dames d'Escoffier International member, she is a contributor to the James Beard Award-winning book *Cooking Gene: A Journey Through African American Culinary History in the Old South*.

The Boren National Security Education scholar holds degrees in nutrition and public health from Tufts Medical School and Oklahoma State University. She formerly held posts in the U.S. Department of Health and Human Services, U.S. Department of Commerce, and the Executive Office of the DC Mayor working on women's policy. She secured federal funding for the first-ever Washington Women and Girls Wellness Conference with 250 leaders to set an agenda to improve the health of 50 percent of the city's residents. Ms. Stevenson also led the development of the first Young Women's Advisory Committee to support the DC Commission for Women. In addition she holds certificates in social marketing and global health communication from New York University-World Health Organization and University of South Florida School of Public Health. She is a PhD student at American University School of Communication starting this fall with the Game Lab and has volunteered for Games for Change in New York. tambraraye.com

Pavithra Vasudevan

Assistant Professor, Department of African and African Diaspora Studies, Center for Women's and Gender Studies, The University of Texas at Austin

Pavithra Vasudevan is a critical and feminist geographer concerned with the devaluation of racialized peoples and landscapes in capitalism, and the possibility of abolitional futures through collective struggle. She is currently working on a book, tentatively titled *Toxic Alchemy: Black Life and Death in Racial Capitalism*, which focuses on the racial burden of toxicity in the aluminum company town of Badin, NC.

Dr. Vasudevan is especially interested in creating artistic work that emerges through collaborations with affected communities. Her creative productions include a short film, *Remembering Kearneytown*, that explores life in Warren County, NC, 30 years after the iconic protests against a toxic waste landfill, and *Race and Waste in an Aluminum Town*, a 90-minute ethnographic play documenting the Black enclave of West Badin's ongoing struggle against aluminum multinational Alcoa Inc. in dealing with occupational and environmental toxicity.

Dr. Vasudevan's work is deeply informed by her background in community organizing and popular education, as well as lifelong study of movement practices, including Bharata Natyam and Odissi dance forms, the martial art of Aikido, and yoga. Prior to graduate school, Dr. Vasudevan worked in New York for seven years as a professional dancer and youth worker, developing curricula and running programs for young women of color. pavithravasudevan.com

Panelist and Workshop Leader Biographies
continued

Monique Verdin
Director, The Land Memory Bank & Seed Exchange

For decades Monique Verdin has intimately documented the complex interconnectedness of environment, economics, culture, climate, and change along the Gulf South. She is a citizen and former councilwoman of south Louisiana's United Houma Nation and is a part of the Another Gulf Is Possible Collaborative core leadership circle of brown (indigenous, Latinx, and desi) women, from Texas to Florida, working to envision just economies, vibrant communities, and sustainable ecologies.

Her indigenous Houma relatives and their lifeways at the ends of the bayous, in the heart of America's Mississippi River Delta, have been the primary focus of her storytelling practice. Ms. Verdin is the subject/co-writer/co-producer of the documentary *My Louisiana Love*. Her interdisciplinary work has been included in an assortment of environmentally inspired projects, including the multi-platform/performance/eco experience *Cry You One*, as well as the publication *Unfathomable City: A New Orleans Atlas*.

Ms. Verdin is also the director of The Land Memory Bank & Seed Exchange, a series of southeast Louisiana activations sharing native seeds and local knowledge through citizen collaboration, while attempting to build a community record of history and present and seeking sustainable solutions. Ms. Verdin also sits on the board of New Harmony High, a hands-on learning, public open-enrollment high school preparing students for graduation, college careers, and beyond through the lens of coastal restoration and delta preservation.

Dottie Yunger
Pastor, Solomons United Methodist Church

Dottie Yunger is the lead pastor of Solomons United Methodist Church in Solomons, MD. She received her master of divinity and master of theological studies from Wesley Theological Seminary in Washington, DC. Pastor Dottie's thesis compared environmental justice themes in the Hebrew Bible to environmental justice issues in the Anacostia watershed. She received a BS in marine science from the University of Maryland.

Pastor Dottie has worked for the Smithsonian Institution, Discovery Channel, and the National Aquarium. For three years, she was the Anacostia Riverkeeper, after which she was the executive director of Interfaith Partners for the Chesapeake, an interfaith environmental organization in the Chesapeake Bay watershed. Recently selected for Earthkeepers, a ministry of the United Methodist Church, Pastor Dottie is a missionary who cares and advocates for local communities and their watersheds. She does so as an aquarist at the Calvert Marine Museum, caring for turtles, otters, and other species of the Patuxent River and Chesapeake Bay.

ACKNOWLEDGEMENTS

The Smithsonian Anacostia Community Museum would like to thank our summit participants:

'Ahahui Mālama I Ka Lōkahi (AML)
Akiima Price Consulting
American University
Center on Race, Poverty & the Environment
Chesapeake Conservancy
Chozen Consulting, LLC
Clean Energy States Alliance
Community Water Center
Creation Justice Ministries
DC Department of Health
ecoLatinos
Gallaudet University
GreenFaith
Greening Youth Foundation
Howard University
Ma Parker and Associates
Mujeres de la Tierra
NAACP
Natural Resources Defense Council
Sierra Club
Skeo Solutions
Solomons United Methodist Church
The Climate Reality Project
The Land Bank & Seed Exchange
The University of Texas at Austin
Trinity Washington University
Union of Concerned Scientists
University of the District of Columbia
WANDA: Women Advancing Nutrition Dietetics and Agriculture
Western Pennsylvania Conference of the United Methodist Church
Wholistic.art
Wild in the City

This project was supported by the DC Commission on the Arts and Humanities which receives funding support from the National Endowment for the Arts.

Special thanks to
The National Education Association
Smithsonian American Women's History Initiative

Photos by Susana Raab

Smithsonian
Anacostia Community Museum

VISION STATEMENT

Urban communities activate their collective power for a more equitable future. We envision healthy neighborhoods that are empowered to work together to solve urgent issues. As a trusted and inclusive center, the Smithsonian Anacostia Community Museum seeks to inspire communities to take action, and is an incubator for the next generation of civically engaged citizens. By illuminating the intersections of history, culture, and contemporary social issues affecting DC metro area communities, including where they are in flux across urban/suburban boundaries, ACM uses a local lens to tell stories that resonate nationally and globally.

MISSION STATEMENT

Together with local communities, the Anacostia Community Museum illuminates and amplifies our collective power.

As our neighborhoods undergo social, economic, and environmental changes that individuals alone cannot address, there is a need for communities to bring together their combined knowledge and strengths. As a museum that convenes people and ideas, ACM documents and preserves communities' memories, struggles, and successes, and offers a platform where diverse voices and cultures can be heard. We believe that bridging disparate parts of our communities can bring collective action to bear on forging a better future together.

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Open daily 10 a.m. to 5 p.m.
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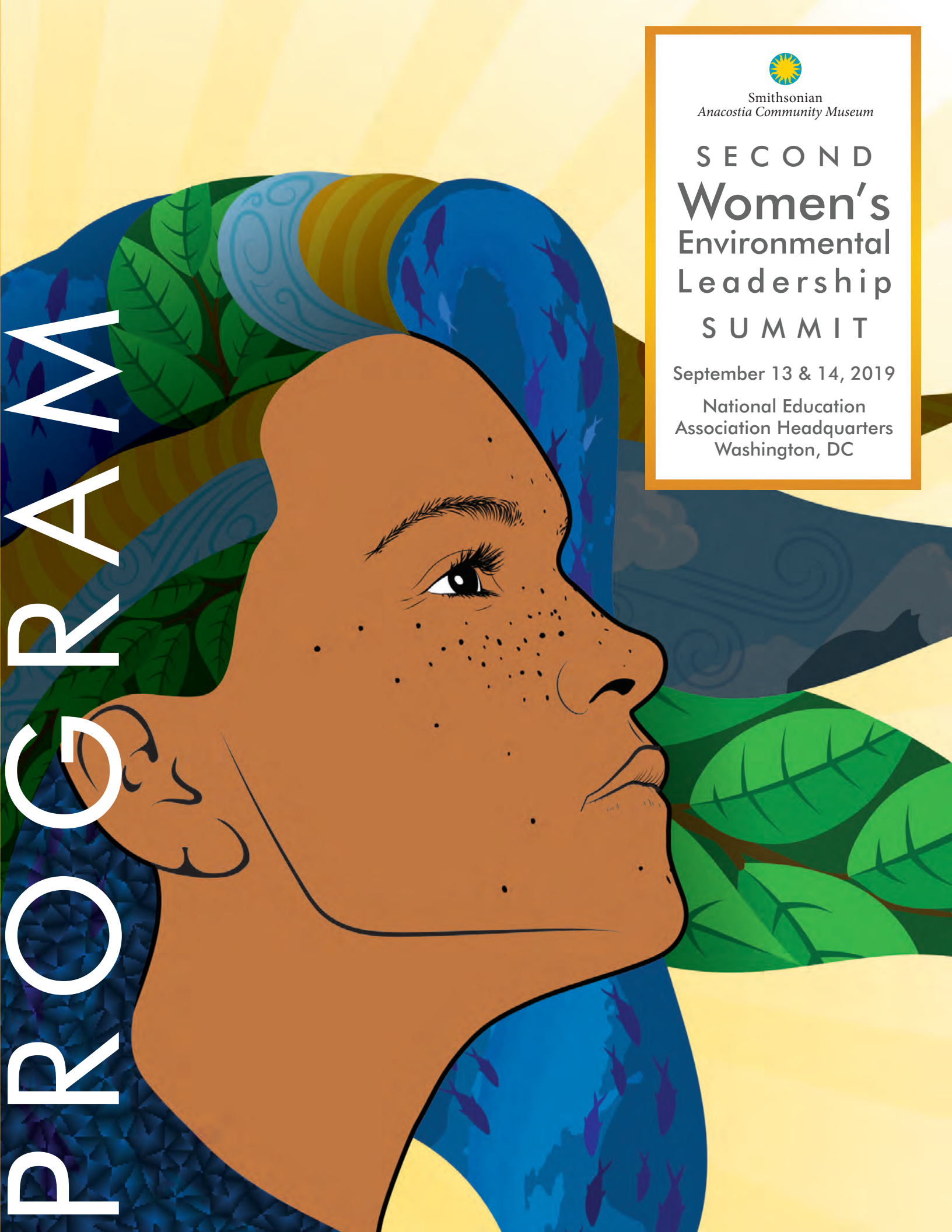

Smithsonian
Anacostia Community Museum

SECOND Women's Environmental Leadership SUMMIT

September 13 & 14, 2019

National Education Association Headquarters
Washington, DC

PROGRAM

Alaska Community Action on Toxics * Alternatives for Community & Environment
Center for Biological Diversity * Center for Environmental Health
Conservation Law Foundation * Greater-Birmingham Alliance to Stop Pollution
Earthjustice * Environmental Justice Clinic, Vermont Law School * Environmental Justice Law Society
Maurice and Jane Sugar Law Center for Economic and Social Justice * Metropolitan Group
New Mexico Environmental Law Center * New York Lawyers for the Public Interest
North Carolina Conservation Network * North Shore Waterfront Conservancy * Ocean Futures Society
People Organized in Defense of Earth & Her Resources * Poverty & Race Research Action Council
WE ACT for Environmental Justice * West End Revitalization Association

Marc Brenman * Richard Grow * Adrienne Hollis * Gladys Limon * Vincent Martin
Wyatt G. Sassman * Sacoby Wilson * Katherine Wolf

Achieving Meaningful Change in a Time of Both Crisis and Opportunity: Ensuring Equal Protection to Achieve Environmental Justice

Title VI EJ Alliance
12/11/20

As President-elect Biden's Plan to Secure Environmental Justice and Equitable Economic Opportunity emphasizes, the COVID-19 pandemic lays bare "how profoundly the energy and environmental policy decisions of the past have failed communities of color"[1] and how the legacy of these decisions and inequitable practices have led to disparities in illness and death on the basis of race, ethnicity, and income level today. The undersigned applaud President-elect Biden and Vice President-elect Harris for committing to achieving environmental justice — including an overhaul of the Environmental Protection Agency's (EPA) External Civil Rights Compliance Office. We, the undersigned environmental justice groups, activists, partners, and allies, present the following recommendations to guide concrete steps on day one, in the first 100 days, and in the longer term, to fulfill this commitment.

Background

COVID-19 has taken the lives of almost 300,000 people in the United States, and the number climbs each day.[2] The incoming administration has the opportunity to launch a meaningful and sustained response to inequities that have caused COVID-19 to infect and kill a disproportionate number of people subjected to systemic racism and the denial of self-determination throughout the United States.

[1] The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity, https://joebiden.com/environmental-justice-plan/ (last visited Dec. 9, 2020).
[2] Center for Disease Control and Prevention, *CDC COVID Data Tracker* (last visited Dec. 8, 2020), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days

Over time, racism, xenophobia, and the valuation of some lives over others have been used to justify the clustering of environmental and public health risks, creating what have become sacrifice zones, with pollution placed out of sight and out of mind for the wealthier, whiter, and privileged few. These forces have been both intentional and unintentional, often operating through market-based mechanisms. Recent research shows that the same communities facing increased exposure to fine particle air pollution experience higher rates of COVID-19 mortality.[3] Lack of access to clean water is undoubtedly also a factor.[4]

Thus, the pandemic has painfully and fatally exacerbated long-standing injustices for Black, Brown, and Immigrant communities, Indigenous peoples, people with disabilities, people who are incarcerated or detained, and low-wage workers across many sectors. This is, tragically and unsurprisingly, a consequence of the long history of colonization, housing segregation, and land use in this country, and the relationship between communities' racial composition and the location of polluting facilities that contribute to poor health status. Communities of Black, Indigenous, and People of Color (BIPOC), as well as low-income communities, are confronting the cumulative impacts of public health and economic crises, on top of environmental and climate risks and perpetual state-sanctioned violence. As the demographic with the highest mortality rate, Black Americans have experienced 21.5% of all COVID-19 deaths nationwide, despite representing just 12.4% of the population.[5] Along the same lines, the Latinx population's death rate from COVID-19 is 14.2% higher than their population share.[6] Filipino American health workers have also experienced higher rates of death.[7] Native communities have some of the highest per capita rates of COVID-19 nationwide.[8]

Each population faces unique challenges that demand attention. Immigrant communities experience disproportionately low socioeconomic status, limited English-language proficiency, racial and ethnic group status, and disproportionately high representation in occupations with

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[3] *See* Xiao Wu, Rachel C. Nethery, Benjamin M. Sabath, Danielle Braun, & Francesca Dominici, *Exposure to air pollution and COVID-19 mortality in the United States: A nationwide cross-sectional study*, NIH Preprint, Apr. 7, 2020, https://doi.org/10.1101/2020.04.05.20054502; *see also* Brookings Institution, *Amid COVID-19, don't ignore the links between poor air quality and public health* (Aug. 19, 2020), https://brook.gs/2Y7WAjH.

[4] See The New York Times, *Checkpoints, Curfews, Airlifts: Virus Rips Through Navajo Nation* (Apr. 20, 2020), https://www.nytimes.com/2020/04/09/us/coronavirus-navajo-nation.html (reporting that several factors, including scarcity of running water, have enabled the virus to spread quickly in the Navajo nation).

[5] APM Research Lab, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.* (Nov. 12, 2020), https://www.apmresearchlab.org/covid/deaths-by-race.

[6] *Id.*

[7] *See* National Nurses United, *Sins of Omission How Government Failures to Track Covid-19 Data Have Led to More Than 1,700 Health Care Worker Deaths and Jeopardize Public Health* (2020), https://www.nationalnursesunited.org/sites/default/files/nnu/graphics/documents/0920_Covid19_SinsOfOmission_Data_Report.pdf.

[8] APM Research Lab, The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S. (Nov. 12, 2020), https://www.apmresearchlab.org/covid/deaths-by-race.

increased risk of COVID-19.[9] These vulnerabilities have led to disparate exposure to pollution by creating social vulnerability and barriers to measures that would limit risks associated with environmental threats.[10]

Indigenous people, who have witnessed the theft and degradation of their lands caused by development and extraction of resources, are now experiencing the profound impact of COVID-19 nationwide. As the group with the second-highest mortality rate, Indigenous peoples have experienced the greatest absolute disparities in COVID-19 mortality rates compared to white residents, even when adjusted for age.[11]

The systemic injustices faced by Black, Brown, and Immigrant communities, along with Indigenous peoples, are shared among people with disabilities, people who are incarcerated or detained, and low-wage workers across many sectors.

This document is meant to outline key executive and legislative actions to ensure that environmentally overburdened BIPOC and low-income communities have a meaningful and determinative say in decisions affecting their health and welfare, to correct long-standing practices that have deprived people of the right to determine their own economic, political, and cultural futures, and to address racial, ethnic, and income-based inequalities in exposure to pollution that has led to disparities in health, welfare, and their very life expectancy. They include specific measures to move the country closer to the constitutionally-guaranteed promise of equal protection before the law to achieve environmental justice.

STRENGTHENING ENVIRONMENTAL JUSTICE POLICIES

The environmental justice movement was ignited by members of Black, Brown, Asian, Pacific Islander, Indigenous, and low-income communities. The movement has been centered around the

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[9] *See* EPA Order 1000.32, *Compliance with Executive Order 13166: Improving Access to Services to Persons with Limited English Proficiency* (updated Feb. 10, 2017), https://www.epa.gov/sites/production/files/2017-03/documents/epa_order_1000.32_compliance_with_executive_order_13166_02.10.2017.pdf; EPA, *Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (2004), https://www.federalregister.gov/documents/2004/06/25/04-14464/guidance-to-environmental-protection-agency-financial-assistance-recipients-regarding-title-vi; Maryia Bakhtsiyarava & Raphael J. Nawrotzki, *Environmental Inequality and Pollution Advantage among Immigrants in the United States*, Applied Geography, Mar. 3, 2017, https://doi.org/10.1016/j.apgeog.2017.02.013.

[10] Maryia Bakhtsiyarava & Raphael J. Nawrotzki, *Environmental Inequality and Pollution Advantage among Immigrants in the United States*, Applied Geography, Mar. 3, 2017, https://doi.org/10.1016/j.apgeog.2017.02.013.

[11] APM Research Lab, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.* (Nov. 12, 2020), https://www.apmresearchlab.org/covid/deaths-by-race.

principles of self-determination and meaningful engagement and addresses the disproportionate burden of the nation's pollution affecting BIPOC and low-income communities.[12]

Twenty-six years after President Clinton signed Executive Order 12898 (EO 12898), *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,[13] residential zip code remains the strongest predictor of life expectancy in the United States.[14] In neighborhoods with facilities whose emissions are reported in the federal Toxic Release Inventory (TRI), people of color comprise 56% of the population on average.[15] Black Americans, specifically, are 75% more likely to live near facilities that contribute to contamination and pollution — and it's not by accident.[16] Oil refineries and other facilities that are known to have negative environmental and health impacts have consistently and intentionally been placed in counties home to communities of color that are often also low-income.[17]

Over the last four years, the federal government has moved the country in the wrong direction. As recently as July of 2020, the Council on Environmental Quality (CEQ) finalized amendments to National Environmental Policy Act (NEPA) regulations[18] that limited, rather than expanded, public participation and rendered invisible the language around cumulative impacts that are disproportionately affecting communities of color and low-income communities. As an initial step, the administration needs to restore and strengthen NEPA. In addition, however, the following recommendations should act as a roadmap for the Biden-Harris administration to address long-standing injustices faced by communities seeking environmental justice — including people of color, Indigenous, and low-income communities — who are disproportionately impacted by environmental harms. As the Plan to Secure Environmental Justice and Equitable Opportunity outlines, the first 100 days should include concrete steps to support community-based monitoring in fenceline communities, target resources to communities that are most impacted, and overhaul civil rights enforcement. The proposals below are intended to amplify and support recommendations by environmental justice groups that have been presented to President-elect Biden's Transition Team.

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[12] Principles of Environmental Justice (1991), https://www.ejnet.org/ej/principles.html.
[13] Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 16, 1994).
[14] Laura Dwyer-Lindgren, Amelia Bertozzi-Villa, Rebecca W. Stubbs, Chloe Morozoff, Johan P. Mackenbach, Frank J. van Lenthe, Ali H. Mokdad, Christopher J. L. Murray, *Inequalities in Life Expectancy Among US Counties, 1980 to 2014: Temporal Trends and Key Drivers*, JAMA Intern. Med., Jul. 1, 2017, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5543324/.
[15] Clean Air Task Force & National Association for the Advancement of Colored People, *Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities*, (2017), https://www.catf.us/wp-content/uploads/2017/11/CATF_Pub_FumesAcrossTheFenceLine.pdf.
[16] *Id.*
[17] *Id.*
[18] U.S. Gov't Accountability Office, B-332373, *Council on Environmental Quality: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act* (2020).

Executive Actions to Strengthen Environmental Justice Policies

EPA & Environmental Justice

1. In conjunction with other federal agencies, the EPA must ensure adequate and thorough implementation of EO 12898.
    a. From day one, require all federal agencies to identify and address the disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on communities of color and low-income communities. This mandate can be reinforced by issuing an updated Executive Order and/or memo to all federal agencies.
    b. Require all federal agencies to develop robust policy and enforcement strategies for the implementation of environmental justice (EJ).
    c. As detailed below, require all federal agencies to prevent discrimination and prohibit disproportionate impact in federal programs affecting human health and the environment by strengthening enforcement of Title VI of the Civil Rights Act of 1964. This includes ensuring that all communities have meaningful access to public information and meaningful public participation opportunities in civil rights complaint adjudication and decision-making.
2. From day one, clarify and implement across the board the requirement that federal agencies conduct meaningful EJ analyses of policies, rules, and permit approval decisions pursuant to EO 12898.
    a. Currently, such analyses are formulaic and appear as conclusory language in proposed rules even if the federal action will, in fact, have a substantial disproportionate impact. The Biden administration must:
        i. Require meaningful analysis and thorough review rather than conclusory statements in rulemaking.
        ii. Set standards and systems to ensure consideration of these analyses.
        iii. Prioritize finalizing methodology for evaluating cumulative impacts both under Title VI and in the EJ context more generally:
            1. Utilize available data by, for example, following approaches taken in California to compare the vulnerabilities of populations by census tract using mapping tools such as CalEnviroScreen;
            2. Prioritize adapting EJ Screen to allow evaluation of relative vulnerabilities by census tract.
    b. From day one, allocate sufficient resources and staffing to conduct and consider EJ analyses.
    c. Re-establish the Title VI Subcommittee within a reinvigorated National Environmental Justice Advisory Council (NEJAC).
    d. Require more robust language access pursuant to both Title VI and EO 12898, including translation of materials (such as notices of hearings, the actual notices

of proposed rulemaking, and advanced notices of proposed rulemaking), and expanded interpretation services to ensure meaningful language access in agency rulemaking and permitting more generally.

    i. This will impact Title VI enforcement: States and other recipients look to federal practice and guidance when determining what are considered vital documents, for example.

3. Reinvigorate the Interagency Working Group on Environmental Justice (IWG).
    a. A reinvigorated IWG should take responsibility for updating the 2011 Memorandum of Understanding, guide agencies toward progress in clearly-defined EJ goals, and lay out methods to measure progress. IWG will work to ensure there are adequate staff and resources provided in agency budgets to work toward these goals. A reinvigorated IWG will ensure agencies publish annual Environmental Justice Progress Reports.
4. The IWG must provide guidance on steps and goals all agencies must consider in their EJ strategic plans and release progress reports on their EJ efforts each year. In 2019, the Government Accountability Office reported the Departments of Commerce, Defense, Education, Homeland Security, Housing and Urban Development, Justice, and Labor failed to update their EJ strategic plans, and the Small Business Administration has not developed a strategic plan.[19] Moreover, the Departments of Agriculture, Commerce, Defense, and Veterans Affairs have not released progress reports on the department's EJ efforts each year.[20] They should be accountable for taking these actions on an annual basis.
5. IWG must reinstate its Committee on the Impacts of Climate Change.
    a. IWG must also create a committee on just transition to provide guidance to agencies on the protection of workers and communities most affected by fossil fuel extraction and the decline of the fossil fuel industry and to consider ways to develop vocational opportunities for jobs in clean energy.
6. The EPA must expand EJ grant programs, including EJ Small Grants, Community Action for a Renewed Environment (CARE) Grants, and Collaborative Problem Solving Grants, as well as Technical Assistance Services for Communities (TASC) technical assistance contractor support.
    a. The EPA must also ensure transparency with grant funding and grant recipients. Information on total award amounts and number of awards is available for FY 1994-2005; however, award information for every following year is restricted to descriptions of the projects funded.

[19] U.S. Gov't Accountability Office, GAO-19-543, *Environmental Justice: Federal Efforts Need Better Planning, Coordination, and Methods to Assess Progress* (2019).
[20] *Id.*

CEQ

7. The Biden administration must select a chair and top officials at the White House Council on Environmental Quality (CEQ) who are committed to advancing and prioritizing civil rights and EJ, akin to the leadership at CEQ in 1993-1999, who led the effort to draft the Executive Order on Environmental Justice and the NEPA Environmental Justice Guidance report.
8. As our partners in the environmental and EJ movements have recommended, the CEQ must restore consideration of cumulative impacts and indirect effects, opportunities for participation, and other provisions regarding the application and scope of review during the decision-making process under NEPA.
    a. Changes should include a broadened definition of "effects" to expressly identify EJ communities and reinstate the inclusion of cumulative impact and indirect effects. Specifically, CEQ should be directed to rescind Trump administration NEPA regulation amendments at 40 C.F.R. § 1508.1(g).
    b. CEQ must empower communities by allowing adequate time to comment on and participate in environmental impact assessments.
        i. CEQ should amend NEPA regulations 40 C.F.R. § 1501.10 and 1503 to extend the time allotted for environmental impact statements and public comment.
        ii. A limitation on the number of pages is a limitation on public input. CEQ must remove the 150- and 300-page limits on environmental impact statements.
        iii. Adherence to a tiering system can ignore vital information in environmental impact assessments by focusing on outdated studies and analyses. Clarify when agencies can use existing studies and environmental analyses in the NEPA process and when agencies would need to supplement such studies and analyses.
9. Give serious consideration to awarding mitigation funds to EJ communities that demonstrate adverse impacts from federally funded projects permitted under NEPA. Thus far, over the National Environmental Policy Act's life, only one EJ community in the nation has been awarded mitigation funds. North Charleston, SC, and the non-profit organization LAM-C arduously pursued mitigation funding while assessing the impacts of the expansion of the Port of Charleston and were ultimately successful. No other EJ community has accomplished a similar feat.
10. Provisions and resources should afford to fund technical assistance to community groups to participate in public comment and hearing processes under NEPA, possibly utilizing U.S. EPA's Technical Assistance Services for Communities (TASC) technical assistance contractor support vehicle.
11. CEQ must coordinate with EPA's Office of Environmental Justice in the exercise of its authority to oversee NEPA and ensure compliance with EO 12898 in this context.

EPA, Civil Rights, and COVID-19

12. The Biden administration must address racial disparities exacerbated by COVID-19 and build an effective civil rights enforcement office at EPA.
    a. Within the first 100 days, the External Civil Rights Compliance Office (ECRCO) must target geographic areas experiencing significant racial disparities in COVID-19 morbidity and mortality, in coordination with the Office of Air and Radiation (OAR), Office of Enforcement and Compliance Assurance (OECA), Office of Environmental Justice (OEJ), Office of Research and Development (ORD), and other relevant offices at EPA to address disproportionate environmental exposures.
    b. Within the first 100 days, ECRCO must initiate affirmative compliance reviews, as authorized by 40 CFR § 7.115(a), in geographic areas experiencing significant racial disparities in COVID-19 morbidity and mortality that coincide with potential environmental exposure (including, but not limited to Detroit, Michigan, and Richmond, Virginia).
    c. In consultation with OAR and OECA, there needs to be targeted immediate assessments of violations of the PM 2.5 Standard in EJ communities experiencing elevated levels of cases and death from COVID-19. Targeted enforcement actions are also necessary to bring these areas into compliance.
    d. EPA's Office of Air Quality Planning and Standards (OAR/OAQPS) and OMB's Office of Information and Regulatory Affairs (OIRA) need to immediately review the recent decision (12/7/20) not to lower the PM standard from the current 12 ug/m3 to the widely recommended 10 ug/m3. Lowering this standard and vigorously enforcing it can be an immediate COVID-19 mitigation strategy for EJ communities across the country.
13. Change the culture at EPA: The Biden administration must appoint an EPA Administrator committed to civil rights and EJ and ensure the selection of top leaders committed to civil rights enforcement and EJ principles.
    a. From day one, the Administrator must convey to top management that civil rights enforcement is a priority at EPA and that they will be responsible and held accountable for civil rights enforcement (in addition to enforcement of environmental laws); concomitantly, this means that the person selected to lead EPA must also come with these values and commitments; otherwise, the effort will ring hollow.
    b. Select strong leadership at ECRCO, OECA, and OEJ with expertise in civil rights enforcement and EJ and provide access to and support from the Administrator.
    c. From day one, through memoranda and in initial meetings, the EPA Administrator must make clear that civil rights enforcement is a priority (including to Assistant Administrators (AA), staff, ECRCO and OECA staff, and to the Environmental Council of the States (ECOS)) and convey that management

and staff will be held strictly accountable for civil rights enforcement and compliance. This could include incorporating civil rights enforcement and EJ compliance as critical elements in key officials' performance plans.

d. Ensure collaboration between ECRCO, OECA, and OEJ, as well as the relevant program offices (including OAR, the Office of Water, and others) — starting with mechanisms for ensuring collaboration around these same areas where high rates of racial disparities in COVID-19 morbidity and mortality coincide with potential environmental exposure.
    i. Place mechanisms and structures to ensure this collaboration occurs, such as workgroups and high-level personnel to direct this work.

14. Implement necessary cultural and structural changes to ensure ECRCO has sufficient autonomy, clout, and resources to enforce civil rights.
    a. From day one, grant ECRCO the authority to hire attorneys with the independent ability to pursue civil rights enforcement. Like the other Title VI staff, these attorneys should work in OECA, not the Office of General Counsel (OGC).
15. From day one, move ECRCO to OECA for greater collaboration and reinforcement of ECRCO's role in enforcement activity.
    a. While support from the General Counsel is critical, placing ECRCO within the OCG creates tension with OGC's role in defending the agency and protecting it from liability.
    b. ECRCO must integrate with EPA's EJ Program, which can be accomplished in a number of ways — through reorganization — for example, if both offices are in OECA, through the implementation of a task force or working group, and/or by creating a new high-level position with responsibility for ensuring greater coordination to address discrimination and advance EJ. These mechanisms must ensure that ECRCO and OEJ coordinate and focus affirmative attention to high priority areas — such as those most impacted by COVID-19. Greater coordination must include the following:
        i. OEJ must include Title VI references and resources in policies, outreach, and training.
        ii. Integration of Title VI into OEJ's outreach and training on EJ tools and methodologies, such as multi-stakeholder collaborative problem-solving.
        iii. Cross referrals between, for example, ECRCO and OEJ (i.e., a referral from OEJ to ECRCO to launch an affirmative investigation) and collaboration — for example, now, in locations with significant disparities in COVID rates and mortality.
        iv. Modifying ECRCO's Case Resolution Manual and practice to ensure that EPA consults with complainants and/or stakeholder communities during the course of investigations and before reaching a resolution agreement or final determination in a case, in conformity with principles of EJ: Note

that while the case resolution manual was published for comment, it contemplated future modifications and can be modified without notice and comment rulemaking.

v. Issue an executive order and/or revise EO 12898 to update the text, and require each agency to ensure full implementation and enforcement of Title VI.

c. More broadly, EPA must take an interagency approach to civil rights enforcement and recognize that decisions happen on the local and state level. ECRCO must engage local and state recipients from day one, making clear that they too are responsible for civil rights compliance as recipients of federal funding.

16. Racial and ethnic diversity, diversity of background, civil rights experience, and expertise are critical criteria for personnel in civil rights and OEJ. Just as EPA staff in the media programs are chosen for experience and expertise, leadership and staff in the areas of civil rights compliance and EJ should be selected for their experience and expertise in civil rights and EJ.
17. In the first 100 days, all AAs, as well as relevant offices (such as the Intergovernmental Relations Office), must receive training on what civil rights enforcement and compliance involves in their specific spheres of responsibility. EPA must develop and deliver training for the deputy civil rights officials and EPA regional staff that focuses on their respective roles and responsibilities within the EPA's Title VI program. Roles at the regional level should be strengthened and clarified, with information about regional responsibilities and points of contact posted on EPA's website.
18. The EPA must communicate to the Environmental Council of the States (ECOS) and recipients of EPA funding that they cannot continue to take actions that have an unjustified disproportionate impact on the basis of race and national origin, whether intentionally or unintentionally. For example, the EPA should clearly communicate that conditions on or denials of permits on EJ grounds are available actions that states can take.
    a. Ultimately, the goal is emissions reduction/pollution reduction, environmental restoration, and diminished environmental health disparities in overburdened communities of color to address disparities on the basis of race and national origin.
    b. It must be clear that decisions on applications for new permits and expansions must consider whether the facilities will have a disproportionate impact on the basis of race or national origin and, if so, whether there's a less discriminatory alternative.
    c. Such decisions (major operating permits, permit renewals, and regulations) require that the recipient of federal funds evaluate racial and ethnicity data and conduct analyses of compliance with Title VI.

d. States must also demonstrate affirmative compliance in their broader programs: For example, all state implementation plan submissions should affirmatively demonstrate compliance with Title VI pursuant to section 110(a)(2)(E) of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(E).

19. EPA should also supplement its internal and Title VI LEP Guidance to strengthen requirements to ensure meaningful language access — for example, by clarifying what vital documents are. Currently, neither EPA nor recipients of federal funds translate the text of proposed rules, for example.
20. ECRCO must be proactive in ensuring that funding recipients comply with Title VI prior to disbursement, conduct reviews to ensure continued compliance, and set forth a strong plan for noncompliance or referral to the Department of Justice (DOJ). Engaging in affirmative compliance does not require new rulemaking: Current regulations provide affirmative authority to conduct pre- and post-award compliance reviews and initiate investigations.[21] Consistent with a recent report from the EPA Office of Inspector General (OIG), which called for "systematic compliance reviews to determine full compliance with the Title VI program,"[22] we strongly recommend that ECRCO exercise this authority within the first 100 days.
    a. ECRCO should stop waiting passively for complaints to be filed before initiating action. Currently, EPA regulations allow for compliance reviews and data collection (and site visits if there is reason to believe there is noncompliance).[i] EPA should be proactive in ensuring that applicants and recipients of federal funds report to EPA on compliance with Title VI and use its affirmative authority to initiate compliance reviews. In the first 100 days, ECRCO should proactively focus on places where significant disparities in COVID-19 morbidity and mortality may be associated with disparities in environmental exposures.
    b. Conduct audits to ensure compliance with requirements: The investigation from the OIG revealed significant gaps in necessary elements that would ensure compliance with Title VI.[23] For example, only 19% of state environmental agencies' websites addressed foundational elements of Title VI compliance, which included posting nondiscrimination notices, grievance procedures readily available to the public, and information published in languages other than English.
    c. Include clear, forceful language in Performance Partnership Agreements (PPAs) that delineate what compliance with Title VI of the Civil Rights Act requires. ECRCO needs to create an evaluation mechanism to determine that agency grant recipients are, in fact, complying with Title VI. Failure to comply must result in

[21] *See* 40 CFR § 7.115(a).
[22] EPA Office of Inspector General, *Improved EPA Oversight of Funding Recipients' Title VI Programs Could Prevent Discrimination* (2020), https://www.epa.gov/sites/production/files/2020-09/documents/_epaoig_20200928-20-e-0333.pdf.
[23] *Id.*

the de-awarding of grants until grant recipients can demonstrate compliance. A periodic review of recipients should be undertaken to demonstrate the seriousness of agency intentions.

21. ECRCO, specifically the associate deputy administrator, must work with EPA programs, regional offices, and other relevant departments to incorporate Title VI into best practices on permitting and cumulative impacts. ECRCO must develop guidelines and train employees on how best practices are implemented and what goals they should achieve.
    a. ECRCO must train, develop, and implement a plan to complete systematic compliance reviews to determine full compliance with the Title VI program.
    b. ECRCO must assess the effectiveness of the Cooperative Federalism initiative. If successful, best practices from the initiative should be implemented in a broader context.
    c. Determine how to use existing or new data to identify and target funding recipients for proactive compliance reviews, and develop or update policy, guidance, and standard operating procedures to collect and use those data.
22. Within the first 100 days, issue a draft programmatic guidance setting forth requirements for recipients of federal funds, using the Federal Transit Administration Circular as a model.[24]
    a. The guidance should be aligned with civil rights standards and finally make clear, consistent with the President-elect's commitment to "rescind EPA's decision in Select Steel,"[25] that compliance with environmental laws is not a defense to a civil rights claim. In particular, EPA must clarify that recipients of EPA funding have distinct obligations to comply with Title VI. Although EPA released Chapter 1 of its External Civil Rights Compliance Office Compliance Toolkit and FAQ on January 18, 2017, in part to withdraw what has been called the "rebuttable presumption" that compliance with environmental laws is a defense to the adversity prong of a disparate impact analysis,[26] time and again in its decisions, EPA continues to either conflate environmental and civil rights standards or gets the standards wrong.[11] To ensure standards are applied appropriately, ECRCO needs training in assessing and applying civil rights standards.

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[24] *See* Federal Transit Administration, FTA C 4702.1B, *Title VI Requirements and Guidelines for Federal Transit Administration Recipients* (2012), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Title_VI_FINAL.pdf.

[25] The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity, https://joebiden.com/environmental-justice-plan/ (last visited Dec. 9, 2020).

[26] EPA, Dear Colleague Letter, External Civil Rights Compliance Office Compliance Toolkit, Frequently Asked Questions (FAQs) for Chapter 1 of the U.S. EPA's External Civil Rights Compliance Office Compliance Toolkit (Jan. 18, 2017), FAQ at 3, https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf ("Does compliance with environmental laws in a given situation equate to compliance with federal civil rights laws? No. If in a given circumstance a recipient is in compliance with applicable environmental laws that fact alone does not necessarily mean that the recipient is in compliance with federal civil rights laws.").

b. The guidance should also set forth affirmative programmatic requirements for recipients of federal funds — including the collection and submission of racial data (on a revised form 4700),[27] analysis of whether decisions comply with Title VI and agency regulations (including whether decisions have a disparate impact on the basis of race or national origin), and other reporting requirements.
c. The guidance should also elaborate on the requirements included in "EPA General Terms and Conditions Effective November 12, 2020."[28]
d. The guidance should specifically address requirements that recipients' programs or activities do not employ criteria, administration methods, or site selection practices causing or contributing to discriminatory impacts or effects.[29]
e. EPA should engage stakeholders to form and finalize the guidance.

23. Commit to transparency in EPA's civil rights enforcement program.
    a. Take a more inclusive approach to its relationship with complainants. ECRCO's Case Resolution Manual incorporated language developed in a white paper in 2013, as a result of concerns raised by complainants across the country about being locked out of deliberations in the case resolution process, most notably in the Angelita C. case.[30] Principles of Environmental Justice require "the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement, and evaluation."[31] ECRCO's Case Resolution Manual should be amended to clarify that consultation with complainants is required, not discretionary.[32]
    b. Within the first 100 days, ECRCO should upload its docket of civil rights cases, including links to public documents for stakeholders to download without having to file a FOIA request.
24. Allocate and prioritize resources to do the work, particularly affirmative compliance activities.

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[27] *See* EPA, Preaward Compliance Review Report for All Applicants and Recipients Requesting EPA Financial Assistance, Form 4700-4 (2014), https://www.epa.gov/sites/production/files/2015-05/documents/epa_form_4700_4.pdf (requiring only that applicants and recipients respond to whether they "maintain demographic data on the race, color, national origin, sex, age, or handicap of the population" served, but not that applicants and recipients report or provide analyses of such data).

[28] *See* EPA, EPA General Title VI Terms and Conditions Effective November 12, 2020 (2020), https://www.epa.gov/sites/production/files/2020-11/documents/fy_2021_epa_general_terms_and_conditions_effective_november_12_2020.pdf.

[29] *See* 40 CFR § 7.35(b) & (c).

[30] *See* Center for Race, Poverty & the Environment, *A Right without a Remedy: How the EPA Failed to Protect the Civil Rights of Latino Schoolchildren,"* at 8, 18 (2016), https://crpe-ej.org/wp-content/uploads/2016/12/Right-without-a-Remedy-FINAL.pdf (describing the demand that "EPA give complainants a seat at the table when EPA negotiates a settlement").

[31] Principles of Environmental Justice (1991), https://www.ejnet.org/ej/principles.html (Principle 7).

[32] *See* Section 3.13, Case Resolution Manual, at 22 ("Engagement with Complainants and Recipients during Informal Resolution"), which currently emphasizes ECRCO's discretion ("ECRCO will use its discretion, when appropriate, to engage complainants who want to provide input on potential resolution issues. ECRCO will determine, based on its enforcement discretion, when such engagement may occur during the process....").

a. The Biden administration's budget proposals must ensure ECRCO has sufficient staffing and resources to initiate and conduct investigations.
b. This includes adequate resources for the alternative dispute resolution programs, which should be made more widely available to civil rights complainants, with funding also available for technical assistance in addition to mediation services.

FEMA, USDA, & Other Federal Agencies

Fifty-six years after the passage of Title VI, it's mind-boggling that recipients of not only EPA funding but also recipients of funding from the family of environmental, agricultural, natural resource, land management, and energy-related agencies continue to make decisions every day without regard to compliance with civil rights laws. Addressing racial disparities in environmental exposure and ensuring EJ requires a reexamination of civil rights enforcement across these agencies, including but not limited to the following:

25. The Federal Emergency Management Agency (FEMA) must apply Title VI protections when it enacts the Stafford Disaster and Relief Emergency Assistance Act to ensure wealth and racial inequalities are not exacerbated.
    a. As climate change makes natural disasters more deadly, communities of color are disproportionately impacted by wealth loss and climate gentrification. The evolving severity due to climate change must be considered when determining the disbursement of federal funding after a natural disaster.
26. The Department of Agriculture (USDA) must comply with EO 12898, enforce Title VI, and ensure equity in funding farmworkers and protecting communities of color, Indigenous and low-income communities from the externalities that pollution from industrial agriculture is imposing on nearby populations.
    a. Target support for Black farmers who are subjected to the adverse impacts of climate change on agriculture while also having to contend with historical racial discrimination from the USDA. New farmer programs must also be targeted to support new prospective farmers of color who want to acquire land and start farming.
    b. Ensure active enforcement of civil rights laws to address discrimination in allocating funding and grant and loan assistance for farmers to prevent farmers of color from falling further behind.

       Civil rights enforcement must also address the disproportionate adverse impacts of industrial agriculture on the basis of race and national origin in places such as the eastern shore of the Delmarva region, eastern North Carolina, Iowa, and central and southern California, which are disproportionately impacted by the hog and poultry industries on the one hand, and dairy facilities on the other.

DOJ & Title VI

27. Executive Order 12250 vested responsibilities in the DOJ to "coordinate the implementation and enforcement by Executive agencies" of Title VI and other laws prohibiting discrimination.[33] The administration must make clear that DOJ has a mandate to ensure civil rights enforcement. DOJ must affirmatively set standards and actively ensure that they are implemented. DOJ must ensure consistent implementation of Title VI and various other nondiscrimination laws across agencies.
28. Within the first 100 days, the DOJ must require uniform reporting from agencies to ensure consistent and effective implementation. Data and data collection methods must be transparent and made publicly available to foster accountability.
29. The DOJ must republish the DOJ Title VI Legal Manual and other guidance documents removed from the DOJ website during the last four years.
30. The DOJ must coordinate with other agencies to expand language access and strengthen guidance documents on language accessibility and Title VI compliance, more generally. Specific requirements related to language access should include the following:
    a. The criteria/definition for what a vital document must be expanded and clarified. Currently, practice does not include, for example, translation of the text of rules for states or other government actors who are recipients of federal funds. Often recipients are under the impression that translating notices and short fact sheets are sufficient.
31. Reinvigorate the DOJ's role in the Title VI Work Group of the IWG to share best practices and ensure greater interagency coordination.

Legislative Actions to Strengthen Environmental Justice Policies

32. The administration's legislative agenda should prioritize passage of provisions in H.R. 5986, Environmental Justice for All Act, https://www.congress.gov/bill/116th-congress/house-bill/5986/text (Grijalva, McEachin) and S. 2236, Environmental Justice Act of 2019, https://www.congress.gov/bill/116th-congress/senate-bill/2236 (Booker, Ruiz), which include enactment of measures to ensure the meaningful assessment of cumulative impacts in the permitting process.
33. Advance equal protection under the law by restoring access to the courts for communities fighting race discrimination in environmental decision-making, and specifically access to the courts to challenge actions with a racially disparate impact by passing a fix for *Alexander v. Sandoval,* 532 U.S. 275 (2001). The Supreme Court ruling in *Sandoval* has prevented aggrieved persons from bringing private actions to enforce Title VI of the Civil Rights Act unless they can demonstrate an intent to

[33] Executive Order 12250, *Leadership and Coordination of Nondiscrimination Laws* (Nov. 2, 1980).

discriminate. This has prevented people living in EJ communities from going to court to enforce the law, which differs from rights afforded to impacted communities under many other bedrock environmental laws. Communities need the ability to go to court to enforce Title VI. There are various legislative proposals — including the EJ For All Act and EJ Act of 2019 — that would provide for this right. To fully realize the promise of Title VI, community members must be able to bring enforcement actions in court.

   a. A more ambitious legislative proposal might be to consider legislation to create a Title VI enforcement agency, either within DOJ or along the lines of an EEOC. This agency could delegate responsibility back to agencies that have the capability (such as the Department of Education) but would relieve EPA and other smaller agencies of a job they've never done well.

34. Codify EO 12898 to ensure environmental and health protections are guaranteed by law.
35. Codify the NEJAC to ensure the continuation of critical input on EJ issues to federal agencies under federal law.
36. Codify and expand EJ grant programs.
   a. Congressional authorization of EJ grant programs, including Environmental Justice Small Grants, CARE, and Collaborative Problem Solving grants, provide communities with assurances that the missions behind these grants will continue to be supported and not left to the discretion of agency administrators.
   b. EJ grant programs should be expanded to improve compliance oversight down to the smallest grants.
37. Funding must be allocated to historically black colleges and universities (HBCU) to facilitate community-based research and community and citizen science.
   a. HBCUs are uniquely positioned to tackle EJ issues, as students of these institutions have endured the consequences of systemic racism and policy decisions that have exacerbated pollution and contamination of their communities.
      i. Investments must be made in HBCUs to upgrade facilities, provide grants to expand STEM offerings, and facilitate climate change research.
38. Legislation must go beyond minimum monitoring requirements and address the underlying issue of insufficient data or poor data collection.[34] Legislation must allocate resources for data to be collected, peer-reviewed, and publicly available. Legislation must provide significant funding for testing and mitigation of environmental pollution in communities of color and low-income communities.
39. Prioritize cleanup and regulation of legacy sites, including Superfund and RCRA sites, abandoned coal mines, coal ash impoundments and landfills, Brownfields, and formerly used Defense and Department of Energy sites by supporting proposals such

[34] U.S. Gov't Accountability Office, GAO-21-38, *Air Pollution: Opportunities to Better Sustain and Modernize the National Air Quality Monitoring System* (2020).

as S. 4617, Environmental Justice Legacy Pollution Cleanup Act of 2020, https://www.justice.gov/crt/executive-order-12250 (Booker, Haaland).

a. Funds must be invested to support the cleanup of legacy sites.
b. Amendments should be made to permitting criteria and the process for permitting hazardous waste facilities. Regulations must be strengthened to emphasize community protection and conformity with EO 12898 and Title VI.

40. Support enactment of H.R. 8019, Climate Equity Act of 2020 https://www.congress.gov/bill/116th-congress/house-bill/8019 (Harris, Ocasio-Cortez).
41. Support enactment of the Justice for Black Farmers Act, S.__, https://www.booker.senate.gov/imo/media/doc/Justice%20for%20Black%20Farmers%20Act%20of%202020%20Bill.pdf (Booker, Warren, and Gillibrand) subsequent policies within the USDA.

FAIR HOUSING & INFRASTRUCTURE

Environmental racism is intertwined with structural discrimination in other areas of land use, including our nation's housing policies. A long history of racial segregation — created and then maintained by both government and private actors — has allowed for the distribution of benefits and burdens along designated neighborhood and community boundaries and census tracts and resulted in the geographic concentration of discriminatory outcomes, including a concentration of polluting facilities, along with the continuation of financial and political disempowerment codified in local land use and zoning. We must redress these injustices through policy reforms across multiple issue areas — including housing policy and infrastructure policy, as well as environmental enforcement — to re-envision our built environment and land-use practices in ways that will break from the long cycle of structural discrimination in our country, and to ensure that our policy responses reflect the lived reality of EJ communities (who face multiple injustices from multiple policy sectors). Housing policy, in particular, is closely linked to EJ policy because of the ways that racial residential segregation continues to serve as a mechanism for discrimination — necessitating that we focus needed resources (such as infrastructure funding and environmental remediation funding) on disinvested communities; ensure the basic human right to safe, healthy housing for all; and ensure that public- and private-sector policies no longer serve as drivers of racial segregation.

Executive Actions to Strengthen Fair Housing and Infrastructure Policies

42. The Department of Housing and Urban Development (HUD) must effectively implement the Fair Housing Act's protections against discrimination, as it is charged with doing under the Act.

a. HUD must restore the 2013 discriminatory effects (disparate impact) regulation, a key measure for addressing structural discrimination and perpetuating segregation, if not restored by Congress. HUD should issue additional guidance or regulations to clarify emerging questions in case law, such as the appropriate causation requirements, to provide robust and meaningful access to fair housing protections.
b. HUD should update and clarify the Fair Housing Act's application to post-acquisition cases to comprehensively address discriminatory municipal service provision and land use and zoning policies.
c. HUD should fully staff the Office of Fair Housing and Equal Opportunity, ensure responsiveness to complaints by Regional Offices by better oversight, and bring in and empower qualified, senior staff with expertise in promoting justice in municipal services, land use, and climate change, to further agency and inter-agency policy development in these areas.

43. HUD must restore the Affirmatively Furthering Fair Housing regulation and improve its operation.
    a. If Congress does not restore the 2015 Affirmatively Furthering Fair Housing (AFFH) rule, HUD must immediately embark on its restoration. HUD should use the opportunity presented by this new rulemaking process to improve the (already effective) rule, including the addition of a complaint process and the requirement that program participants commit to specific, measurable action steps.
    b. Additional agencies — such as DOT and EPA — must implement policies coordinating with the AFFH requirement, such that local, state, and regional government agencies working on inter-related issues are working together to address segregation and remediate disinvestment and discriminatory land use and zoning practices.
44. HUD must implement reforms to the Housing Choice Voucher program to ensure that households participating in the program can exercise housing choice in a full range of communities.
    a. Expand the Small Area Fair Market Rent Regulation to cover additional metropolitan regions, and issue guidance clarifying the rule's operation for public housing authorities.
    b. Update regulations to provide better regional coordination among public housing agencies to ease moves, including across jurisdictional lines, for voucher households that wish to exercise such options.
45. HUD must enact policies to provide oversight and appropriate responses to health conditions arising in subsidized housing stock across all its programs — at both the development/unit level and the neighborhood level. This must entail improved, rigorous site standards and complaint/inspection protocols, with meaningful recourse for impacted residents.

Legislative Actions to Strengthen Fair Housing and Infrastructure Policies

46. Congress should use the Congressional Review Act to restore fair housing regulations rolled back by the Trump administration — specifically, the discriminatory effects rule and the affirmatively furthering fair housing rule.
47. Congress should appropriate sufficient funding to provide safe and habitable public housing throughout our nation, addressing the significant backlog of capital funding needs for repairs and improvements.
48. Congress should appropriate sufficient funding to provide Housing Choice Vouchers for all households that qualify to meet the immediate need. The stock of affordable units must also be expanded through increased funding for the Housing Trust Fund and expanded financial and technical support for community-owned affordable housing (such as land trusts and other social housing models).
49. Congress should provide for lead remediation resources and increase standards and oversight to protect against lead exposure among subsidized and other low-income households.
50. Add source of income as a protected class in federal law to prevent discrimination against housing choice voucher holders and others.
51. Require that federal funding recipients (of a broad array of funds, such that this requirement is not limited to entitlement jurisdictions) reform discriminatory policies, such as exclusionary zoning laws.
52. Provide sufficient funding for safe and sanitary farmworker housing.
53. Ensure that residents of subsidized housing are sufficiently protected from climate change impacts by providing funding for retrofits, repairs and improvements, and the creation of new subsidized units in healthy and climate-resilient areas.
54. Require that HUD and Army Corps of Engineers collaborate to assess new flood zone designations and maps (perhaps in collaboration with ESRI) to update local knowledge about climate-related flooding threats to public, low income, and subsidized housing, and for vulnerable EJ and Tribal communities. Provide federal resources for legal services organizations and other community groups advocating for fair and healthy housing.
55. Provide additional funding to expand HUD staff tasked with fair housing enforcement at the national and regional level, including staff to process complaints and provide front-end civil rights reviews of redevelopment plans, AFFH plans, and other local, state, and public housing initiatives.

RESPECTING INDIGENOUS SOVEREIGNTY AND SELF DETERMINATION

The nation-to-nation relationship with sovereign Native Nations must be strengthened and healed by honoring the federal trust responsibilities to Native Nations and their Peoples. Systemic changes in federal policies are essential to tackling economic, environmental, and health crises. The government must fully enforce Indian treaty rights, honor federal trust responsibilities, and recognize the inherent self-governance and sovereignty of these nations and their citizens.

Executive Actions to Respect Indigenous Sovereignty and Self Determination

56. The Biden administration must uphold the existing treaty rights of sovereign tribal nations.
57. Through executive order, the Biden administration should mandate that no federal action that impacts a tribal land or a tribal ancestral landscape shall be taken without the free, prior and informed consent (FPIC) of the impacted tribal nations. Likewise, federal agencies must immediately adopt regulations and orders stating that they will not proceed without FPIC of impacted tribal nations.
58. The U.S. and its agencies, and state and local agencies to which it delegates authority or provides funding or other support, should commit to incorporating Traditional Ecological Knowledge (TEK) into their policies and practices affecting Native peoples. Executive orders should be adopted mandating that TEK shall be incorporated into any research, assessments, mitigation plans, or other remedial actions. Best practices should be identified, shared, and implemented.
59. Through executive order, the Biden administration should restore Bears Ears to the status sanctioned by the Obama administration and continue the collaborative joint management of this resource as provided for under the prior administration.
60. The Biden administration should review, address, and adopt to the extent possible the "Tribal Recommendations" as included the report by the Departments of Justice, Army, and Interior, "*Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*."[35] Some of the recommendations will require legislative action.
61. The Department of Interior's (DOI) Bureau of Indian Affairs and Bureau of Land Management should immediately adopt an executive order to suspend its attempts to ram through a revision of the Farmington Mancos-Gallup Resource Management Plan Amendment and its accompanying draft environmental impact statement at Eastern Navajo/Chaco Canyon Resource Management Plan (RMP).
    a. DOI should also restart the consultation process on the RMP and environmental impact statement, based on a Programmatic Agreement as provided for at 36 CFR

[35] Dep't of Army, Dep't of Interior, Dep't of Justice, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions* (2017), https://www.achp.gov/sites/default/files/reports/2018-06/ImprovingTribalConsultationandTribalInvolvementinFederalInfrastructureDecisionsJanuary2017.pdf.

800.14(b) and with the advice of the Advisory Council on Historic Preservation. Advice should also be sought from long-time experts in the field, such as Thomas F. King, who has advised many parties, including federal agencies, over his long involvement in such consultation issues.

62. The EPA's action, dated October 1, 2020, in response to *McGirt v. Oklahoma* to place environmental regulation into the hands of the Oklahoma state government and out of the hands of tribal governments should be rescinded.
63. Appoint individuals to the U.S. Nuclear Regulatory Commission (NRC) who have a background in indigenous and civil rights.
64. Rescind the Trump administration's Department of Energy strategy to revive and strengthen the uranium mining industry.
65. Rescind Memorandum of Understanding between EPA and NRC, which diminishes EPA authority over uranium clean up.
66. Immediately scrap the EPA's use of aquifer exemptions from regulations under the Safe Drinking Water Act to protect Underground Sources of Drinking Water from uranium development.
67. Immediately re-initiate the EPA's rulemaking — originally proposed in January 2017, but subsequently rescinded by the Trump administration — to 40 C.F.R. Part 192, which would provide in-situ leaching-specific public health and water quality regulation.
68. Immediately withdraw any regulatory and policy initiatives implemented pursuant to the Trump administration's *Restoring America's Competitive Nuclear Energy Advantage* plan.[36]

Legislative Actions to Respect Indigenous Sovereignty and Self Determination

69. Legislation must fully recognize and support the inherent self-governance and sovereignty of Native Nations and their citizens.
70. Legislation must include initiatives that reflect the nuanced relationships between the Native Nations, including:
    a. The confirmation by Congress that Tribal nations can exercise their full and inherent civil regulatory and adjudicatory authority over their citizens, lands, and resources, and over activities within their Tribal lands;
    b. The codification of FPIC as it relates to Tribal consultation; and
    c. The implementation of the United Nations Declaration on the Rights of Indigenous Peoples, without qualification.
71. Building on *McGirt v. Oklahoma,* 592 U.S. _, 140 S. Ct. 2452 (2020), Native American Treaty Rights should be expanded beyond reservation boundaries to

[36] Dep't of Energy, *Restoring America's Competitive Nuclear Energy Advantage* (2020), https://www.energy.gov/sites/prod/files/2020/04/f74/Restoring%20America%27s%20Competitive%20Nuclear%20Advantage-Blue%20version%5B1%5D.pdf.

include the broad spectrum of rights due to Native Americans under such treaties with the federal government.

72. Support enactment of H.R. 2579, Hardrock Leasing and Reclamation Act https://www.congress.gov/bill/116th-congress/house-bill/2579 (Grijalva), which seeks to reform the 1872 Mining Law by establishing reclamation standards and bonding requirements, creating a fund to reclaim and restore abandoned mines and areas impacted by mining activities, requiring mining operators to report data on amount and value of minerals being extracted from public lands, and establishing a royalty on new mining operations, similar to oil and gas development. Importantly, H.R 2579 includes a requirement for meaningful tribal consultation prior to undertaking any mineral activities that may have substantial direct, or indirect, or cumulative impacts on the lands or interests of a tribal nation.

We hope President-elect Biden and Vice President-elect Harris fully consider all of the recommendations listed above. Building off of the Principles of Environmental Justice, including the right to participate as equal partners at every level of decision-making, the undersigned support these recommendations in guiding concrete steps to fulfill the Biden-Harris administration's commitment to achieving environmental justice.

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